(18)

No. 03-814
Title: Willard Stewart, Petitioner
v.
Dutra Construction Company
Docketed: December 8, 2003
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (02-1713)
Decision Date: September 4, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~
Dec 3 2003	Petition for a writ of certiorari filed. (Response due January 7, 2004)
Jan 7 2004	Motion for leave to file amicus brief filed by Maritime Trades Department, AFL-CIO.
Jan 7 2004	Motion for leave to file amicus brief filed by University of San Francisco Maritime Law Journal.
Jan 7 2004	Brief of respondent Dutra Construction Company in opposition filed.
Jan 19 2004	Reply of petitioner Willard Stewart filed.
Jan 21 2004	DISTRIBUTED for Conference of February 20, 2004.
Feb 23 2004	Motion for leave to file amicus brief filed by University of San Francisco Maritime Law Journal GRANTED.
Feb 23 2004	Motion for leave to file amicus brief filed by Maritime Trades Department, AFL-CIO GRANTED.
Feb 23 2004	Petition GRANTED.
Mar 8 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 7, 2004.
Apr 16 2004	Further extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 24, 2004.
May 21 2004	Brief amicus curiae of the United States filed.
May 21 2004	Brief amicus curiae of Association of Trial Lawyers of America filed.
May 24 2004	Brief of petitioner Willard Stewart filed.
May 24 2004	Joint appendix filed.
May 24 2004	Brief amicus curiae of Diamond Offshore Drilling, Inc., et al. filed.
May 24 2004	Brief amicus curiae of United Brotherhood of Carpenters and Joiners of America filed.
Jun 8 2004	Extension of time within which to file respondent's brief on the merits to and including August 2, 2004.
Aug 2 2004	Brief of respondent Dutra Construction Company filed.
Aug 2 2004	Brief amicus curiae of T.W. LaQay Dredging, Inc. filed.
Aug 2 2004	Brief amicus curiae of Signal Mutual Indemnity Association filed.
Aug 2 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 19 2004	CIRCULATED.
Sep 1 2004	SET FOR ARGUMENT Monday, November 1, 2004.
Sep 7 2004	Reply of petitioner Willard Stewart filed. (Distributed)
Sep 14 2004	Motion for leave to file surreply brief filed by respondent Dutra Construction Company.

	(Distributed)
Sep 28 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 28 2004	Motion for leave to file surreply brief DENIED.
Oct 1 2004	Record received from the U.S.D.C. - Dist. of Massachusetts. (1 box)
Nov 1 2004	Argued. For petitioner: David B. Kaplan, Boston, Mass., and for the United States, as amicus curiae, Lisa S. Blatt, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Frederick E. Connelly, Jr., Boston, Mass.

(1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To qualify for "seaman" status under the Jones Act, a worker must have an "employment-related connection to a vessel in navigation." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 357 (1995). What is the legal standard for determining whether a special purpose watercraft (such as a dredge) is a Jones Act "vessel"?

STATEMENT REGARDING PARTIES

All parties to the proceeding are listed in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Willard Stewart respectfully requests this Court to grant his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The court of appeals issued two reported opinions in this case. The opinion after final judgment (*Stewart II*) is reported at 343 F.3d 10 (CA1 2003) and reprinted as Appendix A, *infra*, at App. 1. The opinion on the interlocutory appeal (*Stewart I*), which addresses the question presented here, is reported at 230 F.3d 461 (CA1 2000), unofficially reported at 2001 AMC 1116, and reprinted as Appendix B, *infra*, at App. 15.

Neither of the district court's summary judgment orders has been reported. The district court granted summary judgment on the vessel status issue from the bench. The transcript of the hearing is reprinted as Appendix E, *infra*, at App. 33. The court granted summary judgment on the remaining claim in a handwritten notation on respondent's summary judgment motion. This motion, including the notation, is reprinted as Appendix C, *infra*, at App. 30, and the formal judgment is reprinted as Appendix D, *infra*, at App. 32.

JURISDICTION

The court of appeals entered judgment on September 4, 2003. This petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The district court had admiralty jurisdiction under 28 U.S.C. § 1333(1) and the Jones Act, 46 U.S.C. App. § 688(a).

RELEVANT STATUTORY PROVISIONS

Appendix F, *infra*, at App. 68, reprints 1 U.S.C. § 3 (defining "vessel"); the Jones Act, 46 U.S.C. App. § 688; and section 2(3)(G) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 902(3)(G).

STATEMENT OF THE CASE

Petitioner Willard Stewart was a marine engineer assigned to respondent's dredge *Super Scoop*. In 1993, the *Super Scoop* – with the assistance of two scows – was dredging a trench across Boston Harbor as part of the construction of the Ted Williams Tunnel. The dredge used its clamshell bucket to scoop sediment from the ocean bottom into one of the scows. When a scow was full of dredged material, it was towed out to sea and dumped.

The Coast Guard classifies the *Super Scoop* as an "industrial vessel." The *Super Scoop* has the typical physical characteristics of a conventional dredge, such as navigational lights, ballast tanks, and a crew dining area. It is registered with the Coast Guard, and it is required to comply with safety regulations issued by the Coast Guard and the Department of Transportation. It has a load line certificate issued by the American Bureau of Shipping. And it is equipped with a global positioning system to enable it to navigate its planned route precisely.

The *Super Scoop* has only limited means of self propulsion. It is moved long distances by tug. To work on the Ted Williams Tunnel project, for example, the dredge was towed from its home base in California, through the Panama Canal, and up the eastern seaboard to Boston Harbor. It can move itself short distances by manipulating its anchors and cables. When dredging the Boston Harbor trench, the *Super Scoop* typically moved twelve times per day by tightening and slacking its cables.

On July 15, 1993, petitioner was working on board one of the scows. While petitioner was on deck, about ten feet above the engine area, the scow (without warning) began to move. It then collided with the *Super Scoop*, causing petitioner to fall headfirst through an open hatch (from which the protective railing had been removed) down to the engine area below. He was seriously injured.

Petitioner filed the present action in the U.S. District Court for the District of Massachusetts, invoking the court's admiralty jurisdiction under 28 U.S.C. § 1333(1) and the Jones Act, 46 U.S.C. App. § 688(a). Petitioner

claimed under the Jones Act, which provides a negligence remedy for injured seamen. In the alternative (in the event that he were found not to qualify as a seaman), he also sought recovery under section 5(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b).

In 1999, the district court granted summary judgment for respondent on the Jones Act claim, holding that petitioner did not qualify as a seaman under the First Circuit's standard announced in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (CA1) (en banc), *cert. denied*, 506 U.S. 827 (1992). *See* App. 65-66. *DiGiovanni* held that a barge or other float whose primary purpose was not navigation or commerce is a Jones Act vessel "only when it is in actual navigation or transit" at the time of the plaintiff's injury. *See* 959 F.2d at 1123; *see also infra* at 6-7 (discussing *DiGiovanni*).

As this is an admiralty case, petitioner was entitled to an interlocutory appeal under 28 U.S.C. § 1292(a)(3). On this appeal (*Stewart I*), the First Circuit affirmed, holding that *DiGiovanni* compelled the district court's conclusion. *See* App. 22-27. In the First Circuit's view, the *Super Scoop*'s "primary purpose" was dredging, "a form of construction," and thus not navigation or commerce. App. 27. And it was not in motion at the time of petitioner's injury.

Although *Stewart I* held against petitioner on the vessel status question, it did not finally resolve the lawsuit; petitioner still had a claim for the same damages under LHWCA § 5(b). Knowing that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," *Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J.), and that this Court could review the vessel status question after final judgment if he were unsuccessful on his LHWCA claim, *see, e.g.*, *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam), petitioner returned to the district court to resolve the remaining issues.

On remand, the district court granted summary judgment for respondent on the LHWCA claim, *see* App. 30-31, and entered final judgment, *see* App. 32. Petitioner again appealed to the First Circuit. While adhering to his argument that the *Super Scoop* was a Jones Act vessel, he also argued that the district court had erred in denying his LHWCA claim. The court of appeals again affirmed. *See* App. 1-14 (*Stewart II*). As this petition does not raise the LHWCA question, only one aspect of the *Stewart II* opinion is relevant here. The court accepted that the *Super Scoop* was a vessel for LHWCA purposes because "the LHWCA's definition of 'vessel' is 'significantly more inclusive than that used in evaluating seaman status under the Jones Act.'" App. 5 (quoting *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 607 (CA1 1996) (en banc), *cert. denied*, 520 U.S. 1117 (1997)).

REASONS FOR GRANTING THE PETITION

Congress provided generous remedies to seamen under the Jones Act, 46 U.S.C. App. § 688, and left it to the courts to define the key term "seaman."[1] From 1958 to 1991, this Court "relegat[ed] [the task of defining 'seaman' to the lower courts," which led to "a 'myriad of standards and lack of uniformity in administering the elements of seaman status.'" *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 353 (1991) (quoting Kenneth G. Engerrand & Jeffrey R. Bale, *Seaman Status Reconsidered*, 24 S. TEX. L.J. 431, 494 (1983)).

In the 1990s, this Court decided four cases that resolved most of the confusion that had arisen in the preceding three decades. *Wilander* addressed the type of activities that a seaman must perform. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991), clarified the coverage

[1] Congress offered some assistance in LHWCA § 2(3)(G), 33 U.S.C. § 902(3)(G), which excludes "a master or member of a crew of any vessel" from LHWCA coverage. *See infra* at 17-19 (discussing § 2(3)(G)); App. 70 (quoting § 2(3)(G)).

boundary between the Jones Act and LHWCA, 33 U.S.C. §§ 901-50. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), explained the type of relationship that a seaman must have to a vessel. And *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997), defined the "fleet doctrine," which enables a seaman to prove his status through a substantial connection to a fleet of vessels under common ownership or control.

While this Court has thoroughly discussed most of the required elements of "seaman" status, one significant requirement remains unclear.[2] It is well established that a Jones Act seaman must have an "employment-related connection to a vessel in navigation," *Latsis*, 515 U.S. at 357; *Wilander*, 498 U.S. at 355, but this Court has never addressed the vessel status requirement under the Jones Act. Indeed, it does not appear to have directly addressed the meaning of the term "vessel" (in any context) since 1903. *See The Robert W. Parsons*, 191 U.S. 17 (1903) (holding that a horse-drawn canal boat used on the Erie Canal was a vessel). During the ensuing century, the maritime industries have developed considerably, and "special purpose" vessels have played an increasingly prominent role. New guidance is urgently required.

The "'myriad of standards and lack of uniformity in administering the elements of seaman status,'" which this Court recognized in *Wilander*, have now largely been

[2] *See generally, e.g.*, John R. Hillsman, *Still Lost in the Labyrinth: The Continuing Puzzle of Seaman Status*, 15 U.S.F. MAR. L.J. 49, 54 (2003) ("Apart from resolving the conflict over vessel status, the Supreme Court has largely done its part."); Jack L. Allbritton & David W. Robertson, *Seaman Status After Chandris, Inc. v. Latsis*, 8 U.S.F. MAR. L.J. 29, 71 (1995) ("*Wilander*, *Gizoni*, and *Latsis* have clarified the law of seaman status considerably, but significant unanswered questions remain. These include the proper definition of a vessel [and] the significance of the *Latsis* Court's disapproval of what it termed the 'snapshot' approach. . . . "). The other "significant unanswered questions" identified in Allbritton & Robertson were resolved in this Court's subsequent *Papai* decision.

corrected. One major piece of unfinished business remains. A "myriad of standards" and a "lack of uniformity" are still apt descriptions for the law of vessel status. At least eight circuits have addressed the issue, and they have developed almost as many separate standards. The present case provides this Court with an ideal vehicle to announce one uniform standard for Jones Act vessel status, thus completing the task that it began in *Wilander*.

I. The state and lower federal courts are in irreconcilable and acknowledged conflict on the "vessel" requirement for "seaman" status under the Jones Act

The decision below reinforces an extreme position in an eight-circuit conflict. Courts and commentators have recognized the multiple conflicts. This Court's guidance is demonstrably required.

A. The First Circuit

The First Circuit established its current test for vessel status in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (CA1) (en banc), *cert. denied*, 506 U.S. 827 (1992), which sought to resolve the tension between its earlier decisions in *Powers v. Bethlehem Steel Corp.*, 477 F.2d 643 (CA1), *cert. denied*, 414 U.S. 856 (1973), and *Bennett v. Perini Corp.*, 510 F.2d 114 (CA1 1975). *DiGiovanni* concerned a crane barge being used in bridge construction. "In all respects it met the commonly understood characteristics of a vessel,"[3] 959 F.2d at 1120, but in the court's view it was

[3] In light of *DiGiovanni*'s recognition that its barge would commonly be recognized as a vessel, some have argued that the decision is concerned not with vessel status but with the meaning of the phrase "vessel in navigation." *See, e.g.*, Hillsman, 15 U.S.F. MAR. L.J. at 66-70. This effort to excuse *DiGiovanni* is doubtful. The phrase "in navigation" does not mean "in motion," but contrasts with "out of navigation" or "withdrawn from navigation" (e.g., for an overhaul or substantial repairs). This Court addressed the distinction in *Latsis*, *see* 515 U.S. at 372-76, and the *DiGiovanni* court was well aware of it, *see* 959 F.2d at

(Continued on following page)

being used simply as a floating platform to support what was essentially shore-based work. The court concluded:

> A worker becomes a seaman not by reason of the physical characteristics of the structure to which he is attached, but because its being operational "in navigation" exposes him to "a seaman's hazards." He is not exposed by what the vessel did in the past, or by its future potential. . . . In sum, if a barge, or other float's "purpose or primary business is *not* navigation or commerce," then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit.

Id. at 1123 (emphasis in original) (quoting *Bernard v. Binnings Construction Co.*, 741 F.2d 824, 829 (CA5 1984)). In reaching this conclusion, the court relied on what it perceived to be the latest trend in Fifth Circuit jurisprudence. *See id.*

A vigorous dissent in *DiGiovanni* observed that the majority went "far beyond what the Fifth Circuit, or for that matter any circuit, has decided, and will create a new split rather than mend old ones." 959 F.2d at 1128 (Torruella, J., dissenting). Judge Torruella argued that the statutory definitions of "vessel" in at least twenty-seven different maritime laws showed Congress's intent to treat this barge as a vessel, *see id.* at 1129-31 (appendix listing various statutory definitions, including 1 U.S.C. § 3), and he predicted that the new rule would create uncertainty and encourage litigation, *see id.* at 1128.

Stewart I not only adhered to *DiGiovanni* but applied its restrictive standard even more narrowly. Whereas *DiGiovanni* had involved a crane barge moored to a bridge

1121 ("a vessel does not cease to be a vessel when she is not voyaging but is at anchor, berthed, or at dockside"). In any event, the decision below has resolved any ambiguity as to *DiGiovanni*'s intent, for it clearly analyzes this as a vessel status case (and uses the phrase "in transit" to refer to the movement required under the *DiGiovanni* test).

(legally an extension of the land), the *Super Scoop* was a dredge in the middle of Boston Harbor. The *DiGiovanni* dissent's fears have been realized, but this case demonstrates that the First Circuit will not make any effort to bring itself into line.

B. Federal and state court decisions following the restrictive First Circuit rule

1. The Sixth Circuit. One federal circuit has adopted the restrictive First Circuit rule. In *Hatch v. Durocher Dock & Dredge, Inc.*, 820 F. Supp. 314 (E.D. Mich. 1993), *aff'd*, 33 F.3d 545 (CA6 1994), the district court described the test used by the Fifth Circuit, contrasted it with the First Circuit rule that had recently been announced in *DiGiovanni*, and "adopt[ed] the *DiGiovanni* test for determining whether a structure is a 'vessel.'" 820 F. Supp. at 316. On appeal, the Sixth Circuit agreed that the First Circuit's standard was preferable to the Fifth's. *See* 33 F.3d at 547-48.

2. The California state courts. Two California appellate decisions have also adopted the *DiGiovanni* test. *See Spears v. Kajima Engineering & Construction, Inc.*, 101 Cal. App.4th 466, 475-78, 124 Cal. Rptr.2d 97, 103-06 (2002); *Gault v. Modern Continental/Roadway Construction Co.*, 100 Cal. App.4th 991, 1000-02, 123 Cal. Rptr.2d 85, 91-92 (2002).

C. The Fifth Circuit

This Court has recognized the Fifth Circuit as the leader in Jones Act jurisprudence because it reviews more seamen's cases than any other circuit. *See, e.g., Latsis*, 515 U.S. at 365. Thus it is no surprise that the Fifth Circuit has had the lion's share of vessel status cases, including Judge Wisdom's seminal opinion in *Offshore Co. v. Robison*, 266 F.2d 769, 779-80 (CA5 1959) (holding that the Jones Act vessel definition "includ[es] special purpose structures not usually employed as a means of transport

by water but designed to float on water," relying in part on the fact that "the law [has] develop[ed] naturally along with the development of unconventional vessels").[4]

There have been scores of vessel status cases in the Fifth Circuit since *Robison*. The most significant are summarized in *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344, 347-50 (CA5 1998), the court's most recent decision on point.[5] The *Manuel* court explained that two lines of cases had developed in the Fifth Circuit. In the more expansive line, the court had "held a variety of special purpose structures, far removed from the conventional notion of ships and seagoing barges, to be vessels." *Id.* at 348. These "structures" included "floating dredges," *id.*, a variety of drilling barges, derrick barges, and spud barges, "even though they also served, in part, as work platforms," *id.* at 347. In the more restrictive line, the court had "held that a variety of structures utilized predominately as work platforms are not vessels." *Id.*; *see also id.* at 349-50 (describing these cases).

The *Manuel* court reconciled the two lines of cases, and in doing so it elevated the significance of the expansive line (based on *Robison*) and minimized the restrictive line (on which *DiGiovanni* had relied). The court declared that "evaluating the importance of the craft's transportation function is the key to determining the craft's status," *id.* at 351, and then immediately stressed "that a vessel can serve the dual function of transporting cargo, equipment, or

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[4] This Court has strongly endorsed Judge Wisdom's *Robison* analysis on other aspects of the seaman status issue. *See Latsis*, 515 U.S. at 365-68; *Wilander*, 498 U.S. at 354-55.

[5] In the five years since *Manuel*, the Fifth Circuit does not appear to have faced the vessel status question in anything resembling the present context. *Cf. Fields v. Pool Offshore, Inc.*, 182 F.3d 353 (CA5 1999) (holding that a Jones Act claim had been fraudulently pleaded in alleging that a "spar," which was indefinitely secured to the ocean floor, was a vessel), *cert. denied*, 528 U.S. 1155 (2000); *Hufnagel v. Omega Service Industries, Inc.*, 182 F.3d 340, 346 n.1 (CA5 1999) (alluding to vessel status, which was not at issue in the case).

persons across navigable waters and acting as a work platform," *id*. Thus the *Manuel* barge (known as "Rig 3") not only served as a platform to support the "workover rig" bolted to it, it also transported the rig to each job site. The court explained:

> The transportation function . . . was not merely incidental. Rig 3's mobility was essential to the work it was designed and built to perform. . . . The mobility of Rig 3 allowed it to service wells located in various places on navigable waters. Rig 3 did more than merely float or move upon navigable waters: It transported all of the necessary equipment across navigable waters to each location. While Rig 3 did serve as a work platform when stationed over wellheads, this does not detract from the importance of its transportation function. Other special purpose craft such as submersible drilling barges, jack-up rigs, and spud barges remain stationary while performing work, yet retain their vessel status. . . . Rig 3 was designed *both* to support the workover rig *and* to transport it on a regular basis from one jobsite to another.

Id. (emphasis in original). Rig 3 was accordingly held to be a vessel as a matter of law.

In the quoted passage, the Fifth Circuit not only rejected the *DiGiovanni* test (noting that "special purpose craft . . . remain stationary while performing work, yet retain their vessel status"), it also explained why the *Super Scoop* would have been a vessel under the Fifth Circuit's standard. Everything that *Manuel*'s barge did for its workover rig, the *Super Scoop* did for the clamshell bucket and other dredging equipment that it carried.[6]

[6] The direct conflict between the First and Fifth Circuits is highlighted by the ease with which the *Manuel* language can be adjusted to address the present facts:

(Continued on following page)

Even if *DiGiovanni* was consistent with one line of Fifth Circuit cases at the time it was decided (which is doubtful), the *DiGiovanni* standard is plainly inconsistent with the Fifth Circuit's current approach.

D. Variations on the Fifth Circuit rule

At least two courts of appeals follow approaches that are based on Fifth Circuit jurisprudence, although their rules – like the First Circuit's – differ from the Fifth Circuit's current standard.

1. The Second Circuit. In *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30 (CA2 1996), the Second Circuit carefully reviewed the "new rule" announced in *DiGiovanni* and concluded that it was "substantially" different from the Fifth Circuit's (despite the First Circuit's effort to rely on Fifth Circuit precedent). *Id*. at 34. The *Tonnesen* court "decline[d] to follow [*DiGiovanni*'s] restrictive interpretation." *Id*. It instead modified the Fifth Circuit standard in a different way, *id*., and announced the following new standard:

> Our test . . . considers (1) whether the structure was being used primarily as a work platform during a reasonable period of time immediately

> [The *Super Scoop*'s] mobility was essential to the work it was designed and built to perform. . . . The mobility of [the *Super Scoop*] allowed it to [travel to Boston Harbor and dredge a trench across the harbor]. [The *Super Scoop*] did more than merely float or move upon navigable waters: It transported all of the necessary [dredging] equipment across navigable waters to each location. While [the *Super Scoop*] did serve as a work platform when stationed [at a particular point along the trench], this does not detract from the importance of its transportation function. . . . [The *Super Scoop*] was designed *both* to support the [dredging equipment] *and* to transport it on a regular basis from one jobsite to another [and along the trench during the dredging project].

Manuel, 135 F.3d at 351 (emphasis in original).

> preceding the accident; (2) whether the structure was moored or otherwise secured at the time of the accident; and (3) whether, despite being capable of movement, any transportation function performed by the structure was merely incidental to its primary purpose of serving as a work platform.

Id. at 36. Because the district court had followed *DiGiovanni*, the Second Circuit reversed the judgment and remanded the case for the application of its newly-announced standard.

In sum, the Second Circuit has created a new standard that is avowedly different from the First's and the Fifth's. Moreover, it has explicitly held that its divergence from the First Circuit is so substantial that judgments entered under the *DiGiovanni* rule must be reversed. *See also Tramutola v. City of New York*, 104 F.3d 356 (CA2 1996) (Table) (reported in full at 1996 U.S. App. LEXIS 30975, *3, 1996 WL 687983, *1) (reiterating that "[t]he *Tonnesen* court considered and rejected the *DiGiovanni* 'primary purpose' standard in favor of a less restrictive test.").

2. The Eleventh Circuit. At its creation, the Eleventh Circuit inherited all of the prior jurisprudence of the "old" Fifth Circuit, *see Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (CA11 1981) (en banc), including the *Robison* line of cases. Since the 1981 split, however, while the Fifth Circuit has been emphasizing its more expansive line of cases, *see supra* at 9, the Eleventh Circuit has taken a more restrictive approach. In *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (CA11 1990), the court held – on facts that were functionally identical to those before the Fifth Circuit in *Manuel* – that a spud barge could not qualify as a Jones Act vessel.

E. The Seventh Circuit

The Seventh Circuit sees relatively few Jones Act cases, and its vessel status standard is ambiguous. In *Johnson v.*

John F. Beasley Construction Co., 742 F.2d 1054, 1063 (CA7 1984), *cert. denied*, 469 U.S. 1211 (1985), the court announced an expansive[7] standard:

> Any floating structure, including those designed for special purposes, is a "vessel" . . . so long as the structure at some time serves as a means of transport on water.

But the Seventh Circuit viewed the definition as "inextricably intertwined" with its in-aid-of-navigation test for seaman status, 742 F.2d at 1063 n.9, which this Court later rejected in *Wilander*. Thus it may be that the Seventh Circuit will abandon its expansive definition (although nothing in *Wilander* casts doubt on it). Most recently, in *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379 (CA7 2001), the Seventh Circuit simply followed Fifth Circuit precedents to hold that a riverboat casino was a vessel – the same result it would have reached under its expansive definition.

Whichever approach the Seventh Circuit takes – *Johnson* or *Weaver* – it is in confliet with the *DiGiovanni* rule that the court of appeals applied in the decision below.

F. Expansive vessel status standards

Although it is unclear whether the Seventh Circuit will ultimately adhere to its expansive definition, two other circuits have consistently taken an expansive approach.

1. The Third Circuit. The Third Circuit has announced no clear standard for determining vessel status under the Jones Act, but in *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (CA3 1975), *cert. denied*, 423 U.S. 1054 (1976), it followed an approach unlike that of any other circuit. The district court had held that the barge at

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[7] The Seventh Circuit recognized that its definition was expansive: "About the only floating structures unable to act as a means of transport on water are [fixed] off-shore drilling platforms . . . and dry docks or floating docks that are regarded as nothing more than extensions of land." 742 F.2d at 1063 n.8.

issue was not a "vessel in navigation," but the court of appeals disagreed on the theory that "the Supreme Court has extended [the Jones Act] remedy so as to permit claims" in a much broader context. *Id.* at 37 (citing *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) (per curiam); *Gianfala v. Texas Co.*, 350 U.S. 879 (1955) (per curiam)). This expansive approach conflicts sharply with the restrictive First Circuit test. Both the *DiGiovanni* barge and the dredge in this case are more like traditional vessels than, for example, the submerged drilling barge in *Gianfala*.[8]

2. The Ninth Circuit. Although "[t]here is no generalized test in the Ninth Circuit for determining [Jones Act vessel status]," *Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132, 1135 (CA9 2002), that court has consistently taken the most expansive approach of any circuit. *Martinez*, for example, held that "a seaworthy fish processing barge that is towed across navigable waters twice a year can qualify as a 'vessel in navigation' [under] the Jones Act," *id.* at 1134, because the barge did not satisfy the court's criteria for *excluding* vessel status:

> [F]loating structures should not be classified as vessels in navigation if they are "incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate."

Id. at 1135 (quoting *Kathriner v. Unisea, Inc.*, 975 F.2d 657, 660 (CA9 1992)). The *Martinez* fish processing barge was not quite permanently moored: although it was moored throughout the time the plaintiff was onboard, it was towed from Seattle to Alaska at the start of each fishing season and back again at the end. *Id.* at 1136. In addition, the *Martinez* vessel served a transportation

[8] The *Gianfala* court of appeals described the barge in its opinion denying seaman status. *See Texas Co. v. Gianfala*, 222 F.2d 382, 384-85 & n.2 (CA5 1955), *rev'd*, 350 U.S. 879 (1955) (per curiam). *See also infra* note 11.

function, albeit one that was "incidental to its primary purpose of serving as a floating fish processing factory." *Id.*

It appears from the Ninth Circuit's decisions that every floating structure qualifies as a Jones Act vessel unless it meets all four of the *Kathriner* criteria. In *Martinez*, for example, the vessel was apparently incapable of independent movement and needed to be towed. *Id.* at 1134. The vessel in *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1328 (CA9 1983), "was constructed [and used] for a purpose other than the transportation of persons or things." Similarly, in *Gizoni v. Southwest Marine, Inc.*, 56 F.3d 1138, 1142 (CA9) (*Gizoni II*), *cert. denied*, 516 U.S. 944 (1995), the court rejected a jury instruction requiring a transportation function that was more than "merely incidental," noting the proper rule to be "that unusual-looking crafts whose purpose is not the transportation of people or things can be considered vessels under the Jones Act." 56 F.3d at 1142. The only floating structure for which the Ninth Circuit has rejected vessel status appears to be the fish processing plant in *Kathriner*. Not only had the converted Liberty ship been permanently moored, but "a large opening" had been cut in the hull to allow for dock traffic, with the result that it would surely sink if it were ever put out to sea. *See* 975 F.2d at 660.

In deciding *Martinez*, the Ninth Circuit explicitly rejected an invitation "to adopt a test established by the Fifth Circuit to determine whether a work platform qualifies as a vessel in navigation." 303 F.3d at 1136. The court reasoned that the Fifth Circuit test would be inconsistent with its own prior decisions. *See id.*

In addition to this acknowledged conflict, the Ninth Circuit approach is in conflict with practically every other circuit's. Both *Martinez* and *Gizoni II* are inconsistent with the First Circuit's *DiGiovanni* standard, for neither vessel was "in transit" at the time of the relevant injury. *See Martinez*, 303 F.3d at 1135; *Gizoni II*, 56 F.3d at 1140 n.1. The *Martinez* vessel did not satisfy any of the three criteria of the Second Circuit's *Tonnesen* test. *See supra* at 11-12 (quoting *Tonnesen*). Whereas the Fifth Circuit has held

that "evaluating the importance of the craft's transportation function" is the key to vessel status, *Manuel*, 135 F.3d at 351, the Ninth Circuit has held that a transportation function is unnecessary. *See Gizoni II*, 56 F.3d at 1142; *Wenzel*, 709 F.2d at 1328. Even the Seventh Circuit's more expansive approach, *see supra* at 12-13, is in conflict with the Ninth Circuit's, because one of the few things the Seventh Circuit requires is that "the structure at some time serves as a means of transport on water." *Johnson*, 742 F.2d at 1063. Finally, the Ninth Circuit is in direct conflict with the Eleventh Circuit, which has adopted a restrictive version of the Fifth Circuit standard. *See supra* at 12. Indeed, the only other circuit's approach that might be consistent with the Ninth's is the Third's, although it remains unclear how expansive the Third Circuit will be. *See supra* at 13-14.

G. Summary

The lower courts are in disarray on the vessel status issue. The First and Sixth Circuits have taken a restrictive approach producing results that would not be seen in any other federal court. At the other end of the spectrum, the Third, Ninth, and perhaps Seventh Circuits have taken much more expansive approaches. Even the three circuits in the middle (the Second, Fifth, and Eleventh Circuits) do not agree among themselves.

The courts of appeals have acknowledged their own disagreements. *See, e.g., Martinez*, 303 F.3d at 1136 (noting that its test differed from the Fifth Circuit's); *Tonnesen*, 82 F.3d at 34 (noting that its test differed from the First Circuit's *DiGiovanni* test and discussing the conflict between the First and Fifth Circuits). Lower courts have also recognized these conflicts. *See, e.g., O'Hara v. Weeks Marine, Inc.*, 928 F. Supp. 257, 259 (E.D.N.Y. 1996) (noting the conflict between the Second and Fifth Circuits); *Hatch*, 820 F. Supp. at 316 (discussing the conflict between the First and Fifth Circuits).

Finally, academic commentators have discussed the conflicts in the scholarly literature. *See, e.g.*, John R. Hillsman, *Still Lost in the Labyrinth: The Continuing*

Puzzle of Seaman Status, 15 U.S.F. MAR. L.J. 49 (2003) (noting that "conflicts had developed among the lower courts over the proper definition of the term 'vessel'" before *Latsis*); Jack L. Allbritton, *Seaman Status in Wilander's Wake*, 68 TUL. L. REV. 373, 400 (1994) (noting the conflict between the First and Fifth Circuits); Churchill H.D. Hooff, *Manuel v. P.A.W. Drilling & Well Service, Inc.: Special Purpose Drilling Barges and Jones Act Vessel Status*, 73 TUL. L. REV. 2155, 2161-63 (1999) (declaring that "circuits vary on which test they use," and noting the conflict between the First and Fifth Circuits, between the First and Second Circuits, and between the Fifth and Eleventh Circuits); Brett D. Wise, *Vessel Classification and the Work Platform Exception*, 70 TUL. L. REV. 691, 693 (1995) (noting the conflict between the First and Fifth Circuits).

The conflict has existed for several years, and it is growing wider. The decision below solidifies the most restrictive position. The Ninth Circuit's *Martinez* decision last year strengthened the expansive position. When the courts on the opposite ends of the spectrum show no signs of moving toward the center, it is obvious that the eight circuits involved will not be able to resolve the conflict without this Court's intervention.

II. The First Circuit rule is in tension with several of this Court's prior decisions

Although this Court has never directly addressed the precise question presented here, the First Circuit's restrictive rule is in tension with several prior decisions.

A. The decision below contradicts the line of cases holding that the term "seaman" in the Jones Act is defined by section 2(3)(G) of the Longshore and Harbor Workers' Compensation Act

Swanson v. Marra Brothers, Inc., 328 U.S. 1, 6-7 (1946), held that the Jones Act and LHWCA are mutually exclusive in their coverages. *Swanson* explained that the exclusion from LHWCA coverage of "a master or member

of a crew of any vessel," LHWCA § 2(3)(G), 33 U.S.C. § 902(3)(G), describes exactly those workers included in Jones Act coverage. In other words, the crewmember exclusion establishes the line of demarcation between the two statutes.

In *Wilander*, this Court took *Swanson* as its benchmark and explained the *Swanson* holding as follows:

> "[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute.

498 U.S. at 347. *See also Papai*, 520 U.S. at 553; *Latsis*, 515 U.S. at 355-56; *Gizoni*, 502 U.S. at 86-88.

Accordingly, the need to define "vessel" in this case arises not from the Jones Act's use of the term – the word "vessel" does not appear in the relevant portion of the Jones Act, 46 U.S.C. App. § 688(a) – but rather from LHWCA's use of the term. It is section 2(3)(G) that makes the meaning of "vessel" relevant.

Because this Court has repeatedly defined the "seaman" covered by the Jones Act as the "master or member of a crew of any vessel" who is excluded from LHWCA coverage, it follows that the inclusion and exclusion must have the same meaning. A "member of a crew of any vessel" qualifying as a Jones Act "seaman" must also be a "member of a crew of any vessel" excluded by LHWCA § 2(3)(G). It would undermine the mutual exclusivity of the two statutes if the phrase had different meanings for Jones Act and LHWCA purposes.

It necessarily follows that "vessel" must have the same meaning in the Jones Act and LHWCA contexts. Yet the court below held to the contrary. In *Stewart I*, it held that the *Super Scoop* was not a Jones Act "vessel." Then in *Stewart II*, it recognized that the *Super Scoop* was a LHWCA "vessel." *See* App. 5 (citing *Morehead*, 97 F.3d at 607). One of these conclusions must be wrong. Permitting inconsistent meanings of the pivotal term "vessel" would

bring a fundamental incoherence to the very center of this Court's delineation of seaman status.

B. The First Circuit rule is inconsistent with this Court's approach to seaman status as explained in *Chandris, Inc. v. Latsis* because the First Circuit has adopted a "snapshot" approach

The *Latsis* plaintiff argued "that any maritime worker who is assigned to a vessel for the duration of a voyage – and whose duties contribute to the vessel's mission – should be classified as a seaman for purposes of injuries incurred during that voyage." 515 U.S. at 361. In rejecting this argument, the *Latsis* Court explained that "courts should not employ 'a "snapshot" test for seaman status, inspecting only the situation as it exists at the instant of injury.' " *Id.* at 363 (quoting *Easley v. Southern Shipbuilding Corp.*, 965 F.2d 1, 5 (CA5 1992), *cert. denied*, 506 U.S. 1050 (1993)).

Despite this guidance, the First Circuit adheres to a test for vessel status – a key part of the seaman status inquiry – that "inspect[s] only the situation as it exists at the instant of injury." Under *DiGiovanni*, the First Circuit takes a snapshot of a special purpose watercraft at the moment of the plaintiff's injury. If the *Super Scoop* had been in motion when petitioner was injured, then the *DiGiovanni* test would have recognized petitioner to be a seaman.

Latsis addressed the proposed "snapshot" test in the context of a worker's connection with a vessel rather than in defining a vessel, but there is no logical reason why a snapshot test should be any less objectionable here. Both the vessel-connection inquiry and the vessel-status inquiry are part of the seaman status question, and this Court rejected the "snapshot" suggestion in broad seaman status terms.[9] The disadvantages identified by the Court (*e.g.*,

[9] Commentators have recognized that the "snapshot" approach in *DiGiovanni* is in tension with this Court's rejection of the same approach in *Latsis*. *See, e.g.*, Allbritton & Robertson, 8 U.S.F. MAR. L.J.

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creating a system whereby workers oscillate back and forth between Jones Act coverage and other remedies; employers being unable to predict who will be covered by which statute during the day) apply with equal force in either context. Even if *Latsis* does not overrule *DiGiovanni*, therefore, the two approaches are seriously inconsistent.

C. The decision below is in tension with this Court's decisions recognizing vessel status for dredges and comparable watercraft

This Court has assumed in prior cases that a stationary special purpose watercraft such as a dredge can qualify as a Jones Act vessel. Most directly on point is *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957),[10] in which the Court upheld the Jones Act claim of a member of the crew of a dredge that was anchored to the Illinois shore of the Mississippi River "during all the time petitioner worked for [the vessel owner]." *Id.* at 372; *see also id.* at 376 (Harlan, J., dissenting) (the plaintiff "never even saw [the dredge] being moved"). The Court clearly assumed that a dredge could be a vessel (although the issue was not directly raised, *see id.* at 371 n.1; 375 n.1 (Harlan, J., dissenting)). Moreover, the Court specifically

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at 71 n.295 (they are "arguably inconsistent"); Hillsman, 15 U.S.F. MAR. L.J. at 67 (noting *DiGiovanni*'s "improper 'snapshot' or 'moment of the injury' test"); Wise, 70 TUL. L. REV. at 714-15 (*DiGiovanni* approach "does not comport well with [*Latsis*]").

[10] *Gizoni* is also closely analogous. This Court explicitly recognized that "several floating platforms, including a pontoon barge, two float barges, a rail barge, a diver's barge, and a crane barge," 502 U.S. at 83, could be Jones Act vessels. *See id.* at 92 (declaring that "[s]ummary judgment was inappropriate" on, among other issues, the vessel status question because plaintiff had alleged sufficient facts to support a jury finding that the barges were vessels). In fact, the barge on which plaintiff was injured was not in motion at the time of the injury. *See Gizoni II*, 56 F.3d at 1140 n.1. There is no suggestion that the barge's activity at the time of the injury was relevant to this Court's view of its vessel status, but the Court may nevertheless have assumed that the barge was in motion at the time. *See* 502 U.S. at 84.

discussed the dredge's failure to be in transit at the time of the seaman's injury (or, indeed, throughout his employment), and considered this lack of movement to be legally irrelevant.

In several other cases, this Court has implicitly recognized that stationary special purpose watercraft can qualify as Jones Act vessels, even when they are less like traditional vessels than the dredge here. Thus in *Gianfala v. Texas Co.*, 350 U.S. 879 (1955) (per curiam), for example, the Court viewed a submerged drilling barge as a Jones Act vessel.[11]

Outside of the Jones Act context, the Court has regularly recognized stationary special purpose watercraft as vessels. Most recently, in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), this Court allowed a barge owner to seek the protection of the Limitation Act, 46 U.S.C. App. §§ 181-88, thus implicitly recognizing a crane barge on a bridge construction project (much like the *DiGiovanni* barge) as a vessel. *See* Limitation Act § 3(a), 46 U.S.C. App. § 183(a) (providing benefits

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[11] *Gianfala* was a summary reversal with no real analysis, but the result necessarily assumes that the submerged drilling barge, *see supra* note 8, was a Jones Act vessel. Moreover, the Court's attention was specifically directed to this issue. The petition raised the question whether the "temporary immobilization of a vessel cause[s] an employee to lose his status as a seaman," Petition for Certiorari at 3, *Gianfala* (O.T. 1955, No. 395), and the petitioner argued that "the fact that this barge was temporarily immobilized at the precise moment of injury does not destroy the decedent's identity as a seaman or the barge's identity as a vessel," *id.* at 16.

The *Gianfala* Court relied on four cases to support its holding. It is noteworthy that two of these cases upheld Jones Act recoveries for crewmembers on dredges. *See* 350 U.S. at 879 (citing *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383 (CA6) (river dredge), *cert. denied*, 346 U.S. 817 (1953); *Gahagan Construction Corp. v. Armao*, 165 F.2d 301, 305 (CA1) (dredge in Boston Harbor), *cert. denied*, 333 U.S. 876 (1948)). In summarily reversing on the authority of these cases, the *Gianfala* Court must have assumed that the dredges were Jones Act vessels.

to "the owner of any vessel"); *cf.* 7A MOORE'S FEDERAL PRACTICE ¶ 215[5], at 2409 (2d ed. 1996) ("any structure that does not qualify as a 'vessel' . . . for Jones Act purposes should not qualify as a vessel for purposes of limiting liability") (footnote omitted).

III. The decision below cleanly presents an important issue that this Court should resolve

A. The vessel status issue is important and ripe for resolution

This Court recognizes the importance of the seaman status issue. In the last decade, it has devoted four cases to clarifying most of the requirements for seaman status. *See supra* at 4-5 (discussing *Wilander*, *Gizoni*, *Latsis*, and *Papai*). Vessel status is the last requirement that the Court must now address in order to complete the task.

The importance of the vessel status issue is underscored by the frequency with which the appellate courts are required to resolve vessel status disputes. The Jones Act is the central statute in the maritime tort field, *see, e.g.*, *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994), and thus it is litigated frequently. Seaman status is a requirement in every case, and vessel status is often at issue when a special purpose watercraft is involved. With the decline of the U.S. blue-water merchant marine, *see, e.g.*, WILLIAM A. LOVETT (ed.), UNITED STATES SHIPPING POLICIES AND THE WORLD MARKET 159 (1996) (table 6.1), most U.S. seamen now work on inland and coastal waters, often on special purpose craft. In view of the uncertainties that exist on the vessel status issue, it is no surprise how often litigants are required to go to the appellate level to resolve disputes.

The vessel status issue has percolated in the courts of appeals for many years. The Fifth Circuit has been directly grappling with the question presented here at least since *Robison* in 1959. In the process, it has examined scores of factual variations and tested several approaches. Other circuits have experimented with variations of the Fifth Circuit standard. Several circuits have multiple

reported appellate decisions. The First Circuit has taken the issue en banc. As a result of this long process, circuit court decisions offer this Court a wide range of possible standards to consider for national adoption. In short, the issue is ripe for this Court's review.

B. The widespread conflict creates serious problems for maritime workers and employers

This Court has also recognized the problems that arise from a lack of clarity on the key requirements for seaman status. Both maritime workers and employers (and their insurers) are disadvantaged when they cannot predict whether the Jones Act will cover a given worker. *See, e.g.*, *Latsis*, 515 U.S. at 363; *Papai*, 520 U.S. at 558. In the worst cases, maritime workers move in and out of Jones Act coverage many times during the course of a workday. *See, e.g.*, *Latsis*, 515 U.S. at 363.

Moreover, the problems are not limited to the Jones Act context. Seaman status defines the border between the Jones Act and LHWCA. *See supra* at 17-18 (discussing *Swanson* and subsequent cases). When the criteria for seaman status are unclear, the limits on LHWCA coverage are also unclear. In addition, the Jones Act criteria for seaman status also apply to claims for "unseaworthiness" and "maintenance and cure" (the general maritime law doctrines protecting seamen). *See, e.g.*, *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1499 (CA5 1995) (en banc), *cert. denied*, 516 U.S. 1046 (1996); *Johnson v. Continental Grain Co.*, 58 F.3d 1232, 1236 (CA8 1995); *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1192 (CA4 1991), *cert. denied*, 503 U.S. 907 (1992). Accordingly, the question presented here is central to defining the rights of practically every maritime worker.

C. This case offers an ideal vehicle to resolve this important issue

Unlike many cases presenting the vessel status issue in conjunction with questions about other requirements for seaman status, *see, e.g.*, *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 63 (CA2 2002) (declining to address vessel status

and deciding the case on other grounds), this case presents the vessel status question cleanly. It is undisputed that petitioner spent virtually all of his working time on the *Super Scoop*, *see Latsis*, 515 U.S. at 371, and that he contributed to its mission, *see Wilander*, 498 U.S. at 355. The case has now proceeded to final judgment, and the vessel status issue is the only question that remains. Thus nothing will distract the Court or prevent it from resolving the vessel status issue.

This case offers an ideal vehicle for the Court to resolve an entrenched, eight-circuit conflict on an important issue of maritime law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 02-1713

WILLARD T. STEWART,

Plaintiff, Appellant,

v.

DUTRA CONSTRUCTION COMPANY, INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MASSACHUSETTS

[Hon. Reginald C. Lindsay, *U.S. District Judge*]

Before

Torruella, Lynch and Howard,
Circuit Judges.

David B. Kaplan, with whom *Thomas M. Bond* and *The Kaplan/Bond Group* were on brief, for appellant.

Frederick E. Connelly, Jr., with whom *Peabody & Arnold LLP* was on brief, for appellee.

September 4, 2003

TORRUELLA, Circuit Judge. Plaintiff-Appellant Willard T. Stewart appeals a decision from the District of Massachusetts granting summary judgment to Defendant-Appellee Dutra Construction Company ("Dutra"), Stewart's employer and the owner of the vessel on which Stewart was injured. Following our decision in *Morehead* v. *Atkinson-Kiewit,* 97 F.3d 603 (1st Cir. 1996) (en banc), we affirm the district court's grant of summary judgment.

I.

Dutra is a dredging company hired by the Commonwealth of Massachusetts to perform drilling, blasting, and dredging work for an immersed tube tunnel under Boston Harbor, now known as the "Ted Williams Tunnel." Dutra used the dredge SUPER SCOOP and the Scow 4 for this work. The SUPER SCOOP is a typical dredge with a clamshell bucket; its function was to move through Boston Harbor, from East Boston to South Boston, digging the ocean bottom as it moved. The Scow 4 was used in conjunction with the SUPER SCOOP. It would be brought alongside the dredge and filled with sediment and dredging material that had been scooped from the ocean bottom by the SUPER SCOOP. Once filled, the Scow 4 would then transport the material out to sea for dumping.

In 1991, Dutra hired Willard Stewart, a marine engineer, to maintain the mechanical systems of the SUPER SCOOP. Stewart spent the majority of his time aboard the SUPER SCOOP, though occasionally he was required to perform maintenance tasks aboard the Scow 4. One such task occurred when the scow's engine malfunctioned, sometime in the middle of July, 1993. With the scow's engine out of commission, the scow doors could not

be opened or closed; as a result, dredging operations came to a temporary halt. To repair the scow, Dutra hired Southworth Milton, an independent contractor, which sent its representative, Timothy Angell, to repair the engine. Dutra also arranged for several of its employees, including Stewart, to assist in the repair process. Eventually it was determined that the engine was beyond repair and would need to be replaced.

Access to the engine was via a hatch on the Scow 4. The old engine was removed, and a new engine was lowered into the scow by means of a crane. At some point it was determined that a protective railing guarding the hatch obstructed the removal of the old engine. The protective railing was subsequently removed.

On July 15, 1993, Angell and Stewart were working aboard the Scow 4. Angell was working in the engine area, and had been for two or three days. Stewart was kneeling over the unguarded open hatch, about ten feet above the engine area, feeding wires through the hatch. While Stewart was precariously perched above the hatch, the SUPER SCOOP's crew moved the scow. At some point in the moving process, there was a jolt, and Stewart plummeted headfirst to a deck below. He was seriously injured.

Stewart filed a complaint for damages under the Jones Act, 46 U.S.C. § 688. The complaint was amended to add an alternative count for vessel negligence pursuant to § 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, authorizing covered employees to sue the vessel as a third party for injury caused by the negligence of a vessel. Stewart's Jones Act and LHWCA claims were predicated upon three alleged acts of negligence. Stewart argues that Dutra was

negligent in: (1) causing the scow to crash suddenly into the SUPER SCOOP; (2) failing to sound a warning blast prior to moving the scow; and (3) creating an unsafe work environment by removing the protective railing around the hatch.

Dutra responded with motions for summary judgment on both counts. Ruling first on the Jones Act count, the district court concluded that because the SUPER SCOOP was not a "vessel," as that term is defined by the Jones Act, Dutra was entitled to an award of summary judgment. Stewart appealed that decision, and we affirmed, concluding that the SUPER SCOOP is not "a 'vessel in navigation' as that term has developed in the jurisprudence of the Jones Act." *Stewart v. Dutra Constr. Co.*, 230 F.3d 461, 469 (1st Cir. 2000) (*Stewart I*).

Following our decision in *Stewart I*, Dutra renewed its motion for summary judgment on the LHWCA claim. The district court granted the motion, and stated only that it was granting Dutra's motion for summary judgment based on the application of *Morehead v. Atkinson-Kiewit*, 97 F.3d 603 (1st Cir. 1996) (en banc). Stewart now appeals that decision.

II.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Rosenberg v. City of Everett*, 328 F.3d 12, 17 (1st Cir. 2003) (*citing* Fed. R. Civ. P. 56(c) (2003)). We review the district court's award of summary judgment de novo, construing the record in the light most favorable to

Stewart and resolving all reasonable inferences in his favor. *Id.*

A. "Vessel" Status

Unlike the *Stewart I* Court, we need not labor over the "vessel" status of the SUPER SCOOP or scow for purposes of the LHWCA. Although the LHWCA permits an employee to sue in negligence only in the event of an injury caused by the negligence of a vessel, 33 U.S.C. § 905(b), the LHWCA's definition of "vessel" is "significantly more inclusive than that used for evaluating seaman status under the Jones Act." *Morehead*, 97 F.3d at 607. Accordingly, Dutra has conceded that for LHWCA purposes, the SUPER SCOOP and Scow 4 are "vessels."

B. Dual Capacity Cases Under the LHWCA

The LHWCA is a comprehensive worker's compensation system which holds employers liable for compensating covered employees injured in the course of their employment, regardless of fault.[1] 33 U.S.C. § 904. The statutory no-fault compensation payments provided by the LHWCA are considered "exclusive and in place of all other liability of such employer to the employee." *Id.* § 905(a). Therefore, employees covered by the LHWCA are statutorily barred from suing their employers for injuries incurred in the course of their employment. However, while the compensation scheme is the employee's exclusive remedy regarding

[1] For a thorough history of the LHWCA, its amendments, and case law, see our en banc opinion in *Morehead*, 97 F.3d at 607-13.

his employer, the employee is still free to sue the *vessel owner* as a third party if his injury was caused by the negligence of the vessel.

Where, as here, the same entity is both employer and vessel owner, the question becomes whether the dual capacity defendant's alleged acts of negligence were committed in its capacity *qua* employer (for which it is immune from tort liability under § 905(a)) or *qua* vessel owner (for which it may be held liable under § 905(b)). *See Morehead,* 97 F.3d at 610. Though dual capacity cases are by nature complex, we fortunately proceed under the guidance of *Morehead,* which has already addressed most of the dual capacity issues raised by the appellants.

1. Morehead v. Atkinson-Kiewit

In *Morehead,* the en banc Court considered a dual capacity claim very similar to this case. Morehead was employed as a carpenter on a bridge construction project and a line-handler on a barge used for the project. *Id.* at 605. Atkinson-Kiewit ("A-K"), the construction contractor, was not only Morehead's employer, but, as charterer of the barge, was also the vessel owner. *Id.* at 606-07 (noting that under 33 U.S.C. § 902(21) bare-boat charterers such as A-K were liable as vessel owners under § 905(b)). While Morehead was handling a heavy line on the barge deck, he stepped backwards into an open hatch and was injured. The hatch had negligently been left open by a co-worker, who, like Morehead, had been hired both for carpenter and scowman duties. *Id.* at 614.

The plaintiff argued that A-K violated vessel duties owed to Morehead because at the time he was injured "A-K as vessel (rather than A-K as employer) [had] 'active

control' over the open hatch." *Id.* That is, because no construction purpose (and therefore no employment purpose) was being pursued at the time of his injury, the hatch was within A-K's control in its capacity as a vessel owner, not an employer.[2] *Id.*

We rejected this argument, and found instead that both Morehead and the employee who left the hatch open "had been hired both for carpenter and scowman duties." *Id.* We noted that both employees "were expected as part of their employment duties to lend a hand with supporting maritime chores as well as to pursue their particular construction trade." *Id.* Consequently, we agreed that A-K's "active control" over the open hatch was "therefore attributable to it as employer, not as vessel, since the hatch was opened . . . and the line thrown in the course of harbor worker duties which both men were regularly hired to perform." *Id.* Since both men were acting as employees, rather than as A-K's agent in a distinct shipowner's capacity, we found that any negligence on A-K's part was committed in its capacity *qua* employer. *Id.* at 616. As a result, Morehead's suit was barred under § 905(a). *Id.*

In reaching this conclusion, we expressly rejected any dual capacity approach that would focus on the specific

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[2] In support of this claim, Morehead emphasized that

> the barges were set alongside the pier and were not carrying construction equipment . . . . [and] A-K had instructed [the employee who left the hatch open] to open the hatch out so that A-K could exercise what Morehead argues was a vessel function – having a marine surveyor examine the barge before returning it to the owner.

Id. at 614.

activities of the employee to determine whether the employee's actions were benefitting the defendant in its capacity as vessel owner or employer at the time the employee was injured. *Id.* at 614-15. That is, we rejected any "functional" approach which would lead us to question whether an accident occurred "in furtherance of a 'construction' objective or a 'vessel' objective." *Id.* We stated:

> A "functional" interpretation, hinging the type of liability on the nature and purpose of the duties being performed by covered employees at any given time, would increase uncertainty and the frequency of disputes over the scope of the coverage. As [the two employees involved in the accidents] employment contemplated that they would alternate frequently between construction and linehandling, a single overall classification of their duties is most appropriate for determining the types of remedies available.

Id. at 615. Because the "functional" approach increased uncertainty and contravened the Congressional intent behind the LHWCA by expanding vessel owner liability, we concluded that the dual capacity vessel could be held liable under section 905(b) only to the extent that it breached its duties of care while acting in its capacity as a vessel. *Id.*

III.

Stewart makes two arguments in support of his claim that Dutra's allegedly negligent actions occurred in its capacity as vessel owner, rather than in its capacity as employer. First, Stewart claims because the scow had been taken out of service and had done no dredging work for two days prior to the accident, the work Stewart was

performing when he was injured can only be considered "vessel" work. Second, Stewart avers that Dutra remained in "actual control" of the area where he was injured because the engine and hatch area of the vessel were under the "actual control" of Timothy Angell, an independent maritime agent working distinctly on behalf of the vessel. Stewart contends that because Dutra created the negligent condition that was the proximate cause of Stewart's injuries through its agent as vessel owner, Dutra breached its vessel duties to Stewart and is liable under § 905(b). After careful consideration, we conclude that the former argument is precisely the sort of "functional" analysis precluded by *Morehead;* the latter we reject as procedurally defaulted.

A. Stewart's Functional Dual capacity Analysis

Stewart's first argument is essentially that all injuries occurring incident to repair work on a vessel implicate the defendant's capacity as a vessel owner rather than as an employer. According to Stewart, it is significant that the scow had been taken out of service and had done no dredging for two days prior to the accident. Once the crew (Stewart included) was diverted from their ordinary dredging activities to work on repair-related activities, the work they performed could only be considered "vessel" work, not "dredging" work. To support this argument, Stewart argues by analogy that "[i]f Dutra dredging company had chartered the Scow 4 from another entity, it would have returned the Scow 4 to said entity to replace the engine. A dredging contractor would not purchase a new engine in a vessel it did not own." Moreover, the Southworth Milton employee hired to repair the engine had nothing to do with the dredging operation. As a result,

Stewart maintains that the repair operations that led to his injury furthered a distinctly "vessel" objective.

This argument does not differ from the "functional" analysis rejected by the *Morehead* Court in any significant way. In *Morehead,* the plaintiff argued that the purpose of leaving the hatch open furthered the vessel's purposes, and did not further any employment purpose. Rejecting this argument, we noted that the LHWCA had been amended to "provide employees and employers with a greater degree of certainty as to the coverage in effect." *Id.* at 615. Accordingly, the legislative history of the 1984 Amendments documents the legislature's concerns about predicating coverage upon the nature of the task the employee was performing when injured:

> The situation in which a worker may be covered at one time, and not covered at another, depending on the nature of the work which the worker is performing at the time of the injury must be avoided since such a result would be enormously destabilizing and would thus defeat one of the essential purposes of the amendments.

Id. (quoting H.R. Rep. No. 98-570(I), 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 2734, 2736-37).

Eschewing this approach, we noted that "as is typical in the case of harbor workers . . . [employees] were expected as part of their employment duties to lend a hand with supporting maritime chores as well as to pursue their particular construction trade." *Id.* at 614. Since both Morehead and the employee who left the hatch open were performing tasks that were contemplated by the terms of their employment, we deemed that the defendant was liable only in its capacity as employer.

Like Morehead, Stewart was performing the work he was hired to do. Although Stewart spent the majority of his time aboard the SUPER SCOOP, he, like the other employees on the SUPER SCOOP, was hired to perform tasks relating both to dredging and to occasional maintenance work on both vessels. His job contemplated performing maintenance tasks on a variety of engines and machinery related to the dredging process, including engines used for the dredging-crane, scow engines, and deck winches used for moving the dredge. He was therefore performing his regular duties as an engineer on a dredging operation.

Stewart has not cited any cases to the effect that major repair work on a vessel is inherently vessel-oriented, and not employment-oriented work. Given *Morehead*'s explicit rejection of a "functional" approach to dual capacity cases and Congress's plain intention to avoid creating uncertainty as to actions covered by the LHWCA, we are compelled to reject this argument.

B. Dutra's "Active Control" Duty

Stewart next argues that Dutra breached its vessel duties to him by remaining in active control over, and creating an unsafe condition in, the area where he was injured. This argument is based on vessel duties established by the Supreme Court in *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 175-76 (1981).

In *Morehead,* we concluded that the owner of a dual capacity vessel could be held liable under § 905(b) where it breached its *Scindia* duties while acting in its capacity as vessel. *Morehead,* 97 F.3d at 615. The *Scindia* Court articulated three types of duties a vessel owner owed to

stevedoring employees. First, shipowners have a duty to turn over "the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety." *Scindia,* 451 U.S. at 167. This duty, commonly referred to as the "turnover duty," includes a duty to warn the stevedore of latent dangers that could not be discovered through the exercise of reasonable care.

Second, once stevedoring operations have begun, the vessel owner will be liable if it "actively involves itself in the cargo operations and negligently injures a longshoreman." *Id.* That is, if the vessel owner maintains active control over an area or operation, the vessel is liable for any injuries it negligently inflicts incident to the area or operation. *Id.*

Finally, a shipowner has a duty to intervene to protect stevedoring workers if it acquires actual knowledge that the vessel or equipment pose a danger and the stevedore is not exercising reasonable care to protect its employees from that risk. *Id.* at 175-76.

According to Stewart, both the area where the incident occurred and the repair activities that were taking place there were under the control of Angell, who was acting as a separate maritime agent specifically for the vessel. The presence of Angell, Stewart argues, distinguishes this case from *Morehead* because in that case, we noted that "[t]he allegedly negligent conditions (the open hatch and the absence of warnings) were not attributable to the errors of separate maritime agents acting specifically for the vessel." *Morehead,* 97 F.3d at 614. Stewart therefore contends that through Angell, Dutra as vessel owner knew or should have been aware of the danger

created by removing the protective railings around the hatch; Dutra is therefore liable in its capacity as vessel owner for its alleged breach of *Scindia*'s "active control" duty.

We decline to consider whether Dutra's actions and the presence of Angell in the engine room warrant consideration under *Scindia.* Stewart's contention that Dutra retained active control over the engine/hatch area is procedurally defaulted by his failure to raise the issue before the district court. "The law in this circuit is crystalline: a litigant's failure to explicitly raise an issue before the district court forecloses that party from raising the issue for the first time on appeal." *Boston Beer Co. Ltd. P'ship.* v. *Slesar Bros. Brewing Co.,* 9 F.3d 175, 180 (1st Cir. 1993). In the district court, Stewart's opposition to Dutra's motion for summary judgment made only passing mention of Timothy Angell, and at no point contended that he was a "separate maritime agent" whose presence distinguishes this case from *Morehead.* Indeed, the "active control" argument seems to have surfaced for the first time in Stewart's briefs to this Court.

In his briefs before the district court, Stewart refers to Angell as a "mechanic" working for "independent contractor," Southworth Milton. Nowhere does he make any other reference to the legal or employment status of Angell, nor does he otherwise discuss whether Angell exercised actual control over the scow or any portion thereof. These passing references do not amount to an argument that Angell was a separate maritime agent in actual control of the scow. *See DiMarco-Zappa v. Cabanillas,* 238 F.3d 25, 34 (1st Cir. 2001) ("Simply noting an argument in passing without explanation is insufficient to avoid waiver."); *Beaudett v. City of Hampton,* 775 F.2d 1274, 1278 (4th Cir. 1985)

(appellate courts should not permit "fleeting references to preserve questions on appeal"). We therefore reject, as procedurally defaulted, Stewart's contention that Angell's activity aboard the scow distinguishes this case from *Morehead* or triggers *Escindia* liability in the form of a breach of the active control duty.

IV.

Our decision in *Morehead* compels us to find that Stewart's claim is barred by § 905(a) because he was injured while performing his regular duties as an engineer on a dredging operation. The district court's grant of summary judgment is affirmed.

Affirmed.

APPENDIX B

United States Court of Appeals
For the First Circuit

Nos. 99-1487
000-1090

WILLARD STEWART,

Plaintiff, Appellant,

v.

DUTRA CONSTRUCTION COMPANY, INC.,

Defendant, Appellee.

APPEALS FROM THE UNITED
STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Reginald C. Lindsay, *U.S. District Judge*]

Before

Selya, *Circuit Judge*,

Bownes, *Senior Circuit Judge*,

and Stahl, *Circuit Judge*.

David B. Kaplan, with whom *Thomas M. Bond* and *The Kaplan / Bond Group* were on brief, for appellant.
John J. O'Connor, with whom *Frederick E. Connelly, Jr.*, and *Peabody & Arnold LLP* were on brief, for appellee.

October 31, 2000

SELYA, *Circuit Judge.* In a case reminiscent of Coleridge's storied seafarer, who was doomed to tell the same tale over and over again, *see* Samuel T. Coleridge, *Rime of the Ancient Mariner* (1798), plaintiff-appellant Willard Stewart invites us to reexamine, narrow, or distinguish our holding in *DiGiovanni* v. *Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992) (en banc), and declare his floating work platform – a dredge engaged in the excavation of a tunnel in the Boston Harbor – to be a "vessel in navigation" as that term is used in the jurisprudence of the Jones Act, 46 U.S.C. App. § 688. We conclude that we are bound by our en banc precedent and that, under it, the dredge in question is not a vessel in navigation within the contemplation of the Jones Act. Consequently, we affirm the district court's entry of partial summary judgment in the defendant-employer's favor.

I. BACKGROUND

We divide our depiction of the relevant background into three segments. The facts are mostly undisputed. Consistent with the conventional summary judgment praxis, we take the few controverted facts in the light most flattering to the nonmovant (here, the appellant). *See McCarthy* v. *Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995).

A. The Dredge.

The SUPER SCOOP is a large floating platform – its exact dimensions do not appear in the record – equipped

with a clamshell bucket. It operates as a dredge, removing silt from the ocean floor and dumping the sediment onto one of two scows that float alongside. Once the scows are full, tugboats tow them out to sea and dispose of the dredged material.

Though largely stationary, the SUPER SCOOP has navigation lights, ballast tanks, and a dining area for the crew. Crew members control the clamshell bucket by manipulating a tag-line cable attached to a counterweight. The SUPER SCOOP is incapable of self-propulsion. Crew members use anchors and cables to achieve positional movement at near-glacial speeds. The SUPER SCOOP typically moves once every two hours, covering a distance of thirty to fifty feet. Its scows also lack any means of self-propulsion. Tugboats normally are used to achieve movement. Alternatively, the dredge's crew drops a bucket from the dredge into one of the scow's hoppers; by manipulating the cables, the crew then swings the bucket so that it guides the scow around the dredge.

The SUPER SCOOP is classified as an industrial vessel, and as such, it is required to register and comply with safety regulations issued by the Coast Guard and the United States Department of Transportation. Similarly, the American Bureau of Shipping has issued a load-line certificate to the SUPER SCOOP.

B. The Incident.

Defendant-appellee Dutra Construction Company (Dutra) hired the appellant, a marine engineer, to maintain the mechanical systems of the SUPER SCOOP. Dutra purposed to use the SUPER SCOOP to help construct an immersed-tube tunnel across the Boston Harbor. The

operational plan called for floating prefabricated tube sections to the site, sinking the tubes into a previously dredged trench, and then covering the sunken tubes with backfill.

The appellant began work in late 1991. The SUPER SCOOP started to dig the cross-harbor trench needed for the tunnel. The process was long and laborious. It was still ongoing on July 15, 1993. On that date, however, the SUPER SCOOP lay idle because one of its scows (Scow No. 4) was out of commission and the other was at sea.

During this lull, the appellant boarded Scow No. 4 to effect repairs. While he was working, the SUPER SCOOP's crew proceeded to move the scow. When the scow reached its new position on the SUPER SCOOP's starboard side, the two structures collided. Dislodged by the collision, the appellant plummeted headfirst to a deck below. He sustained serious injuries.

C. The Travel of the Case.

The appellant subsequently sued Dutra in the United States District Court for the District of Massachusetts. One count of his complaint invoked the Jones Act. After a substantial period of pretrial discovery, Dutra moved for summary judgment on all counts. *See* Fed. R. Civ. P. 56. In due course, the district court, ruling *ore tenus,* denied the motion as to certain counts, but granted *brevis* disposition

on the Jones Act count. This interlocutory appeal followed.[1]

II. APPELLATE JURISDICTION

We turn briefly to the threshold issue of appellate jurisdiction. *See BIW Deceived* v. *Local S6,* 132 F.3d 824, 828 (1st Cir. 1997) (explaining that a federal court has an unflagging obligation to inquire into its own jurisdiction).

In civil cases, the usual source of appellate jurisdiction is 28 U.S.C. § 1291 (conferring appellate jurisdiction over "final decisions" of the district courts). Here, however, the order granting partial summary judgment did not dispose of all the claims asserted. Thus, this court lacks jurisdiction under section 1291. *See North Carolina Nat'l Bank* v. *Montilla,* 600 F.2d 333, 334-35 (1st Cir. 1979) (per curiam); *see generally FDIC* v. *Ogden Corp.,* 202 F.3d 454, 458-59 (1st Cir. 2000) (discussing concept of finality).

Withal, there are exceptions to the "final judgment" rule – and one such exception pertains here. Congress, in its wisdom, has enacted a special statute that permits immediate appeals from interlocutory district court orders "determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." 28 U.S.C. § 1292(a)(3). Thus, an interlocutory order in an admiralty case can be appealed immediately so long as it conclusively determines the merits of a particular

[1] In fact, there are two appeals before us – but the second is from the district court's denial of a rehearing. Because it adds nothing to the dimensions of the case, we proceed as if the appellant had filed only an appeal from the entry of the order granting partial summary judgment.

claim or defense. *Martha's Vineyard Scuba Headquarters, Inc.* v. *Unidentified, Wrecked and Abandoned Steam Vessel,* 833 F.2d 1059, 1062-64 (1st Cir. 1987).

The case at hand satisfies that requirement: the district court's order determining, as a matter of law, that the SUPER SCOOP was not a vessel in navigation within the purview of the applicable Jones Act jurisprudence (and that, therefore, the appellant had no cognizable claim under that statute) plainly implicates section 1292(a)(3). Accordingly, we have jurisdiction to hear and determine this appeal.

III. THE MERITS

Having reached the merits, we first frame the issue. We then group the appellant's arguments and address them under two headings.

A. Framing the Issue.

The Jones Act provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury. . . .

46 U.S.C. App. § 688(a). Congress enacted this legislation in 1920 to protect seamen because of their exposure to the perils of the sea. *Chandris, Inc.* v. *Latsis,* 515 U.S. 347, 354 (1995). That taxonomy seems straightforward, but it is hardly self-elucidating – and the devil is in the details. As a result, the determination of who qualifies as a seaman for this purpose has proven to be a gnarly proposition. *E.g., id.* at 356 (bemoaning that, due to definitional difficulties,

the "perils of the sea, which mariners suffer and shipowners insure against, have met their match in the perils of judicial review") (citation omitted).

Over time, the Court has untangled some of the doctrinal knots. Although the Jones Act itself does not use the word "vessel," the Court has placed a gloss on the statute. This gloss clarifies that a prospective plaintiff's status as a seaman (and, therefore, his eligibility to sue under the Jones Act) depends, in the first instance, on his connection to a "vessel in navigation." *McDermott Int'l, Inc.* v. *Wilander,* 498 U.S. 337, 354 (1991). But the Justices have spoken rather elliptically as to the nature of that connection, *e.g., Chandris,* 515 U.S. at 368-71; *Wilander,* 498 U.S. at 354-57, and they have left the lower courts to fret, largely unguided, over what is – or is not – a vessel in navigation. That question is of utmost importance here, as Dutra acknowledges the appellant's status as a member of the SUPER SCOOP's crew. The pivotal issue, then, is whether the SUPER SCOOP, at the time of the accident, was a vessel in navigation as that term is used in the jurisprudence of the Jones Act.

In many cases, the deceptively simple question of whether a particular floating object is a vessel in navigation reduces to a question of fact. *See Chandris,* 515 U.S. at 373. But when the facts and the reasonable inferences extractable therefrom, viewed in the light most congenial to the injured worker, bring a particular structure outside any permissible understanding of the term, the court may determine the status of the structure as a matter of law. *See Tonnesen* v. *Yonkers Contracting Co.,* 82 F.3d 30, 33 (2d Cir. 1996); *Bennett* v. *Perini Corp.,* 510 F.2d 114, 116 (1st Cir. 1975). Believing that this case came within that class of cases, the court below opted to decide the issue. And, it

concluded that the dredge was not a vessel in navigation. We review its determination de novo. *See Garside* v. *Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990).

B. Stare Decisis.

In attempting to convince us that the district court erred in not deeming the SUPER SCOOP a vessel in navigation for Jones Act purposes, the appellant runs headlong into controlling precedent. Eight years ago, this court, sitting en banc, confronted a case in which a plaintiff had sustained injuries while working aboard the barge BETTY F. We described the barge as follows:

> The BETTY F was a barge, 100 feet in length, with a 40 foot beam and a raked bow and stern, and with nautical equipment, such as navigation and anchor lights. In all respects it met the commonly understood characteristics of a vessel, and, indeed, was inspected by the Coast Guard. It had no means of self-propulsion, except that positional movement could be achieved by manipulating its spud anchors. Its current use was to float at the Jamestown, Rhode Island, bridge, bearing a crane that was being used for bridge construction. . . . It had been at the Jamestown bridge for a month. It was positioned about the bridge, and moved away from the pilings at night, to prevent damage.

DiGiovanni, 959 F.2d at 1120-21.

DiGiovanni, whose main responsibility was to handle a tag-line to guide the crane, slipped and fell while standing on the deck of an appurtenant supply barge (which served as a work platform). *Id.* at 1121. He attempted to sue under various theories. We rejected his Jones Act

claim on the basis that the BETTY F was not a vessel in navigation. *Id.* at 1124. We held squarely that "if a barge, or other float's 'purpose or primary business is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen [for Jones Act purposes] only when it is in actual navigation or transit." *Id.* at 1123 (quoting *Bernard* v. *Binnings Constr. Co.*, 741 F.2d 824, 829 (5th Cir. 1984)).

The appellant exhorts us to scuttle the holding of *DiGiovanni,* denouncing the standard it embodies as impractical, unwise, and inconsistent with the decisions of other courts (including the Fifth Circuit). But our precedent-based system of justice places a premium on finality, stability, and certainty in the law, particularly in the field of statutory construction. *See Hubbard* v. *United States,* 514 U.S. 695, 711 (1995). Thus, the principle of *stare decisis* – the doctrine that "renders the ruling of *law* in a case binding in future cases before the same court or other courts owing obedience to the decision," *Gately v. Massachusetts,* 2 F.3d 1221, 1226 (1st Cir. 1993) – is an integral component of our jurisprudence. This principle, fairly applied, demands our allegiance to *DiGiovanni.*

We do not pledge this allegiance blindly. We recognize that "*stare decisis* is neither a straightjacket nor an immutable rule." *Carpenters Local Union No. 26* v. *United States Fid. & Guar. Co.,* 215 F.3d 136, 142 (1st Cir. 2000). Nevertheless, a departure from a court's own precedent, in the teeth of the principle of *stare decisis,* must be supported by some "special justification." *Dickerson* v. *United States,* 120 S.Ct. 2326, 2336 (2000). For example, prior

circuit precedent will yield to a contrary decision of the Supreme Court or to a statutory overruling. *Williams* v. *Ashland Eng'g Co.*, 45 F.3d 588, 592 (1st Cir. 1995).[2] Here, however, no subsequent opinion of the Supreme Court has cast doubt on *DiGiovanni,* nor has the Jones Act been amended in any relevant respect. Consequently, no "special justification" exists to support a deviation from circuit precedent.

In *Williams,* we also noted that on rare occasions a circuit precedent, though not directly overruled or superseded, nonetheless might crumble in the face of compelling authority. *See id.* We speculated that this might occur, say, when persuasive case law postdating "the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind." *Id.* We are dubious that this scenario can ever play out where, as here, a panel of a court finds its path blocked by an earlier decision of the full court. *Cf. Ewing* v. *Williams,* 596 F.2d 391, 397 (9th Cir. 1979) (declaring that "an appellate panel simply cannot modify an *en banc* decision"). A contrary rule – permitting a single panel in a multi-panel circuit to revisit determinations made by the court as a whole – would invite chaos. For that reason, panels generally are precluded from following such a maverick course. *E.g., United States* v. *Norton,* 780 F.2d 21, 23 (8th Cir. 1985); *United States* v. *Poolaw,* 588 F.2d

[2] In *Williams,* we also spoke of a subsequent decision of the court itself, sitting en banc. 45 F.3d at 592. That justification does not apply here; *DiGiovanni* is an en banc opinion, and the full court has not repudiated it.

103, 105 (5th Cir. 1979); *cf. Biggins* v. *Hazen Paper Co.,* 111 F.3d 205, 208 (1st Cir. 1997) (holding that a panel may not reconsider issues decided earlier in the same case by the en banc court).

In this case, all roads lead to Rome. *DiGiovanni* has not been overruled by a higher authority and remains good law. Even if we assume, for argument's sake, that in some extraordinary circumstance a panel might be warranted in declaring an earlier en banc decision obsolete and refusing to follow it, the appellant has offered no adequate justification for applying such a long-odds exception here. We hold, therefore, that we are bound by *DiGiovanni.*

C. Other Arguments.

The appellant's remaining arguments take a different tack. He posits that, even under *DiGiovanni,* the SUPER SCOOP qualifies as a vessel in navigation. This argument depends, in the last analysis, on the appellant's ability to distinguish the SUPER SCOOP from its *DiGiovanni* counterpart, the BETTY F. Like the district court, we are unable to discern a meaningful distinction.

To begin with, the appellant claims that the *DiGiovanni* standard does not apply to the SUPER SCOOP at all because that standard only applies to "barges or other floats." *DiGiovanni,* 959 F.2d at 1123. He then brings to bear a potpourri of other criteria, citing, on the one hand, to formulations drawn from statutes (other than the Jones Act), Coast Guard classifications, and encyclopedia definitions, and, on the other hand, to the SUPER SCOOP's appurtenances (such as ballast tanks, navigational lights, and the like). These attributes, he says, show that the SUPER SCOOP is a vessel in navigation. This attempt to maneuver around *DiGiovanni* quickly runs aground.

In the first place, when the *DiGiovanni* court spoke of "floats," that word was meant to encompass a wide variety of objects. Surely, a dredge falls within its sweep. To read *DiGiovanni* more narrowly, as the appellant urges, would strip the en banc court's holding of all practical meaning.

In the second place, the term "vessel in navigation," as it has been employed in the Jones Act context, is a term of art. Jones Act recovery hinges not on the physical characteristics of a structure or on how others might view it, but, rather, on the structure's function and use. Thus, in *DiGiovanni,* the court refused to place decretory significance on maritime classifications or equipage. *See id.* Indeed, the *DiGiovanni* dissent made exactly the same sort of plea that the appellant makes here, *see id.* at 1124-25 (Torruella, J., dissenting), and the full court nonetheless held the BETTY F not to be a vessel in navigation for Jones Act purposes.[3] Consistent with that approach, we conclude that a dredge like the SUPER SCOOP comes within the compass of this court's holding in *DiGiovanni.*

The appellant next notes that, according to the *DiGiovanni* court, a barge or float may be considered a Jones Act vessel if "its purpose or primary business" is navigation or commerce. *Id.* at 1123. Seizing on this statement, he alleges that the SUPER SCOOP qualifies under this rubric. In his view, dredging itself is a form of navigation

[3] Like the SUPER SCOOP, the BETTY F possessed "the commonly understood characteristics of a vessel"; for instance, it was registered with the Coast Guard, obliged to comply with various safety regulations applicable to ships, and had navigation lights, ballast tanks, and the like. *See DiGiovanni,* 959 F.2d at 1120. We could continue, but the point is readily evident.

and transportation: to dredge, the SUPER SCOOP must transport the clamshell bucket and associated equipment across the harbor, and must cause the dredged material to be carried out to sea. He notes, too, that the SUPER SCOOP was situated in the harbor at the time of the accident, had a captain and a crew (but no shoreside employees), and carried navigational equipment.

This construct distorts the functional analysis that we endorsed in *DiGiovanni.* That analysis focuses on *primary* functions and, at bottom, dredging is primarily a form of construction. Any navigation or transportation that may be required is incidental to this primary function. In this respect, the only real distinction between the SUPER SCOOP and the BETTY F is that the former was being used in the construction of a cross-harbor tunnel while the latter was being used in the construction of an over-the-bay bridge. It does not help the appellant that both structures were moved with some regularity across navigable waters; even regular movement of a floating structure across navigable waters will not transform that structure into a vessel when that motion is incidental to the central purpose served by the structure. *See Bernard,* 741 F.2d at 830-31. Because both the SUPER SCOOP and the BETTY F were floating stages used primarily as extensions of the land for the purpose of securing heavy equipment to construct a passage across the sea, neither is a vessel in navigation within the jurisprudence of the Jones Act. *See Powers* v. *Bethlehem Steel Corp.,* 477 F.2d 643, 646 (1st Cir. 1973).

The appellant has one last fallback position. He maintains that even if the SUPER SCOOP was not a vessel in navigation, Scow No. 4 – the structure on which he was working when the accident occurred – was a vessel

in navigation because it was actually in transit at that time. Building on this foundation, he argues that since Scow No. 4 was part of the SUPER SCOOP's flotilla, liability under the Jones Act should attach.

This argument, too, is targeted at an exception to the rule laid down in *DiGiovanni.* There, we recognized that, even if a floating structure's primary purpose was not navigational, workers nonetheless might be considered seamen within the contemplation of the Jones Act if the structure "is in actual navigation or transit" at the time an injury occurred. *DiGiovanni,* 959 F.2d at 1123. The facts of this case, however, do not bring the appellant within the contours of this exception.

First and foremost, the appellant's status as a seaman depends upon the movement *vel non* of the SUPER SCOOP, not the incidental positioning of an appurtenant scow. The determinative factor in this equation is that the appellant was assigned permanently to (i.e., was part of the crew of) the SUPER SCOOP, not Scow No. 4. *See Bennett,* 510 F.2d at 116-17. And by his own admission, the SUPER SCOOP was not in motion when the accident occurred. Thus, the fact that the scow was being moved is irrelevant. *See DiGiovanni,* 959 F.2d at 1124 (holding that the plaintiff's location on the supply barge at the time of the accident did not alter his status). The *DiGiovanni* exception does not obtain.

In an effort to sail around this obstacle, the appellant asseverates that we should attach significance to Scow No. 4's movement at the time of the accident because the scow was a part of the SUPER SCOOP's flotilla. This asseveration misconstrues Supreme Court precedent. The Court has held that a plaintiff's relationship to a fleet of vessels,

rather than to a particular ship, can establish the *connection* needed to confer seaman status. *Harbor Tug & Barge Co.* v. *Papai,* 520 U.S. 548, 555-57 (1997); *Chandris,* 515 U.S. at 368. Here, however, the connection element is not in issue (Dutra has conceded the point). The common ownership of the dredge and scow has no probative force on the subjacent issue: whether the floating work station was – or was not – a vessel in navigation for Jones Act purposes. *See DiGiovanni,* 959 F.2d at 1124.

IV. CONCLUSION

We need go no further. Given the on-point precedent established by the en banc court less than a decade ago and the absence of any trialworthy issue of material fact, the SUPER SCOOP is not a "vessel in navigation" as that term has developed in the jurisprudence of the Jones Act. Consequently, the lower court appropriately jettisoned the Jones Act count.

Affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

WILLARD STEWART Plaintiff v. DUTRA CONSTRUCTION CO., INC. Defendant	CIVIL ACTION NO. 95-11046-RCL

DEFENDANT, DUTRA CONSTRUCTION CO., INC.'S MOTION FOR RENEWED SUMMARY JUDGMENT ON ALL REMAINING COUNTS

(Filed Nov. 5, 2001)

This case arises out of an accident that occurred on July 15, 1993. The plaintiff was employed by Dutra Construction Co., Inc. ("Dutra") as an engineer assigned to the dredge Superscoop, owned and operated by Dutra. Dutra was hired to dredge Boston Harbor for the laying of the third harbor tunnel. The plaintiff alleges that he was injured when he fell through an open hatch while on dump Scow #4 which was being maneuvered along side the Superscoop.

On October 17, 1996 the defendant filed Defendant, Dutra Construction Co., Inc.'s Supplemental Motion for Summary Judgment. That Motion addressed the recently added count in plaintiff's Amended Complaint brought pursuant to Section 905(b) of the Longshore & Harbor Workers' Compensation Act. Because of bankruptcy proceedings the case was dismissed without prejudice for

two years. The Motions for Summary Judgment were finally heard on March 29, 1999. At the hearing the Court denied the defendant's request for summary judgment on the Section 905(b) count even though plaintiff's counsel stated to the Court . . . "I am not really – the 905 argument is just – was just a fallback position. I am not really opposing

* * *

[5/21/02 Motion allowed based on an application of *Morehead v Atkinson – Kiewit*, 97 F.3d 603 (1st Cir. 1996) to the undisputed facts of record in this case. /s/ Reginald C. Lindsay]

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLARD STEWART
Plaintiff

CIVIL ACTION

V.

No. *95-11046-RCL*

DUTRA CONSTRUCTION CO., INC.
Defendant

JUDGMENT

LINDSAY, D. J.

In accordance with the Court's Order dated *May 21, 2002* granting defendant's motion for summary judgment in the above-entitled action, it is hereby ORDERED:

Judgment for the *defendant Dutra Construction Co., Inc. on all counts*

By the Court,

May 21, 2002
Date

/s/ Lisa M. Hourihan
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT FOR
DISTRICT OF MASSACHUSETTS

Civil Action No. 95-11046

****

WILLARD STEWART

vs.

DUTRA CONSTRUCTION COMPANY, INC.

****

MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE REGINALD C. LINDSAY
UNITED STATES DISTRICT JUDGE

Courtroom 11, 5th floor
Courthouse Way
Boston, Massachusetts 02210
Date: March 29, 1999

APPEARANCES:

Marvin Barish, Esq., and Greg Nester, Esq., on behalf of the plaintiff.
Frederick Connelly, Esq., on behalf of the defendant.

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[2] P-R-O-C-E-E-D-I-N-G-S

THE CLERK: All rise. Court is in session. Please be seated.

This is a Civil Action Number 95-11046.

Would counsel identify themselves.

MR. CONNELLY: Frederick Connelly. Moving party to the defendant, Your Honor.

THE COURT: Mr. Connelly.

MR. CONNELLY: Yes, Your Honor.

THE COURT: Okay.

MR. BARISH: Marvin Barish representing the plaintiff, Your Honor.

THE COURT: Okay

MR. NESTER: And I am Gregory Nester, also here for the plaintiff, Your Honor.

THE COURT: Nester?

MR. NESTER: Nester, correct.

THE COURT: Mr. Connolly [sic].

MR. CONNELLY: Thank you, Your Honor.

Your Honor, this is the –

THE COURT: Tell me this before you start, one thing isn't clear to me from the record, and I will let you tell me. Where is it, where did Mr. Stewart get injured? Was he injured on this scow? Did he fall in a hole on the scow or on the SUPER SCOOP?

[3] MR. CONNELLY: He was actually on the scow, was drawn next to and then tied up to.

THE COURT: He was on the other – on the boat?

MR. CONNELLY: He was on the scow.

THE COURT: Or on the boat, the scow. There is no disagreement about the scow, is there?

MR. CONNELLY: As far as what, Your Honor?

THE COURT: A vessel.

MR. CONNELLY: As far as the scow being a vessel, really don't – I haven't researched that, Your Honor, whether that would be considered a vessel. Also, it does not have any self-propulsion. It must be towed by a tug boat out to sea.

THE COURT: This isn't one of those scows that bring people back and forth to the SUPER SCOOP?

MR. CONNELLY: It's called a dump scow, Your Honor. 90 percent of it is just a big bucket that opens up at sea and drops the dredge material out. The engine on it that he was working on was on an engine to propel it. It was an engine that opened the bottom of the scow.

THE COURT: It's not an injury from the scow itself?

MR. CONNELLY: Correct, Your Honor. It's on the scow itself, but it's not to propel the scow.

THE COURT: Okay. Go ahead.

[4] MR. CONNELLY: Your Honor, my first point I want to raise is that this motion for summary judgement was filed back in 1996.

THE COURT: Yes, I know.

MR. CONNELLY: After I filed it, the plaintiff amended their complain [sic] to add a count under Chapter 905B. I amended the motion as well to cover that. Friday, I was not in the office, but Friday I was hand delivered a supplemental memo in opposition. I believe that is quite untimely. It was written –

THE COURT: Was there permission granted to file such a supplemental memorandum given?

MR. BARISH: Your Honor, I don't believe there was permission granted. It just seemed that three years there, it would bring the court up-to-date.

THE COURT: I recognize three years is a long time. I am not sure, I think this motion was terminated during some period of time.

MR. CONNELLY: Yes.

MR. BARISH: By bankruptcy.

MR. CONNELLY: Yes, a year and a half, due to bankruptcy.

THE COURT: But –

MR. BARISH: I have no permission to do it, Your Honor.

[5] THE COURT: Okay. I am not sure whether I should consider it.

MR. BARISH: I thought it would be helpful.

THE COURT: I think it might have been helpful, but I think you are – so you have to get leave to file such a motion.

MR. BARISH: Yes, sir. I think I can say what – I think I can argue the same things.

MR. CONNELLY: I appreciate it, Your Honor. Again, this was first going to be heard in December of this year, and at the request of plaintiff's counsel, it was continued until today, so there was ample time.

THE COURT: Not only that, many of the cases that you cited, I did look at it, many of the cases you cite are cases that go back to 1980. There was one new case, a 1998 case.

MR. BARISH: The only purpose of this memo, Your Honor, was to deal with Mr. Connolly's [sic] statement that DiGiovanni is accepted everywhere and most likely authority. I want to point out it was inaccurate. The case he relied on was overturned.

THE COURT: I suppose I don't want to get you too far off the track. Even if it's not the enlightened authority, maybe it's the authority in the First Circuit, [6] and even if it is unenlightened, I am bound by it.

MR. BARISH: Well, Your Honor –

THE COURT: That is the law in the First Circuit.

MR. BARISH: I don't want to jump ahead. It's just that DiGiovanni has nothing to do with the facts in

this case and should not be extended. I am not arguing that DiGiovanni is bad law.

THE COURT: Okay. Right. Let me let Mr. Mr. Connelly go on.

MR. CONNELLY: Thank you, Your Honor.

Your Honor, that is in fact the main argument today for the defendants is that DiGiovanni is applicable to this case, and it is the law in the First Circuit. In their first brief and in their latter brief, there has been no cases cited, certainly from the First circuit that overturned DiGiovanni, and there is no cases from the Supreme Court that overturned DiGiovanni.

THE COURT: DiGiovanni has been – don't you think . . . case limits DiGiovanni at least to the extent that DiGiovanni says that what you do is to determine whether the vessel was in navigation at the time; that is no longer the law. DiGiovanni says that you find out what the – whether the vessel is a – whether the instrument is a vessel depends on a party's purpose, and so on appearance and purpose and so on or whether it was in navigation at the [7] time.

Now, to the extent that it has that provision, navigation at the time, don't you think it's been at least implicitly overruled by Chandris that says you don't take that snapshot. That may not have anything to do with this case.

MR. CONNELLY: That's as far as this case is concerned, that Chandris' decision does not affect the DiGiovanni at all as far as –

THE COURT: Because that is not part of this case, but you are saying it's still good law, and I wonder whether it's good law in every aspect of the case, but it may not have anything to do with this case.

MR. CONNELLY: We think it is still good law, and the law of the First Circuit as far as determining whether or not the SUPER SCOOP which is the plaintiff's allegation that he was assigned to the SUPER SCOOP, that is the vessel he alleges he was assigned to.

THE COURT: On that basis, let's talk about this case as opposed to DiGiovanni. DiGiovanni was something attached to a bridge, was it not, the instrument or the thing, I don't want to use a word, because the only word I can think of is vessel, but the instrument was attached to a bridge.

This SUPER SCOOP moves five or six times a day, [8] doesn't it?

MR. CONNELLY: Yes, and so does the barge. We can call it in DiGiovanni. It moved actually more times a day than did the SUPER SCOOP. It moved along the bridge. It also had no means of self-propulsion, neither did the –

THE COURT: This moves along the water?

MR. CONNELLY: It moves along the water, yes. It's dredging as opposed to working on the bridge. The DiGiovanni vessel, I think it's the BETTY F.

THE COURT: Yes. It doesn't matter.

MR. CONNELLY: Was moved along, and it can be moved along by it's anchor as well. The SUPER SCOOP

can also be moved along short distances by it's anchors, you know, drawing in on one side and pulling on the other.

Same type of movement moving along instead of working on a bridge and moving along that way, it was moving along and dredging it, but for the purposes that we believe that for the argument here today, Your Honor, that the difference between building a bridge for cars and building a tunnel of cars is really no difference.

THE COURT: Wasn't BETTY F actually attached to the bridge itself?

MR. CONNELLY: It would attach itself, I believe, Your Honor, my reading the case, it attached itself just when it was working on it at that point and then move on and [9] then unattached and then move on.

THE COURT: Does distance it can move make a difference, after all, the Super Scoop can move all over the harbor.

MR. CONNELLY: Well, the DiGiovanni vessel can as well, Your Honor, it was towed quite a distance to get to that site and towed back again. In fact, the DiGiovanni vessel would be towed more accurately, would be towed in more in the evening to the shore than the vessel, than the SUPER SCOOP.

THE COURT: I am not talking so much as the towing, the moving along the navigation during the course of the day or moving during the course of the day.

MR. CONNELLY: In both situations, they would move by their anchors or if they want to move a longer distance, if they want to, it would be by a tow, but

the SUPER SCOOPER moves a very short distance during the day, Your Honor.

THE COURT: Where was it moving for.

MR. CONNELLY: Dredging, simply to dredge, as they dug the Fred [sic] Williams tunnel, if it moved about 30 feet at times, six times a day, roughly, and this over a 24-hour period. It was going on 24 hours, so in a 24-hour period, it would move about six times, all depending on what they are digging. If they hit rock, they would move less easily. If the muck is coming up nice and easy, they might move a [10] little bit more. It was gradual movements as they are digging the harbor tunnel, dredging. The Super Scooper [sic] has a permanently affixed crane. There was also a crane on the BETTY F in DiGiovanni.

Again, both had to be towed to move long distances. Mr – as we have already mentioned, Mr. Stewart was injured when he was working on the scow, helping someone to work on the engine. He was doing some electrical wiring. It was – the scow was brought in a little closer to the SUPER SCOOP. It was – if must have been bumped. He lost his balance and fell through the hatch.

My brother will argue that seaman status is generally viewed as a mixed question of law. In fact, the summary judge – the summary judgement motion, Your Honor, is appropriate under several cases, including McDermott and Chandris, both Supreme Court cases. The facts in now will reasonably support one conclusion, and it's the defendant's position that there is only one reasonable conclusion in this case.

THE COURT: And why is that?

MR. CONNELLY: Why is there only one reasonable conclusion in this case, Your Honor?

THE COURT: Yes.

MR. CONNELLY: Because I believe because of the similarity, and the facts between this case and the [11] DiGiovanni case, that like the DiGiovanni court, this court should decide as an matter of law that this is not a vessel. That it is a work platform that he was working on and not a vessel. He is not entitled to the special protections given to a Jones Act seaman.

THE COURT: Navigational aids on the SUPER SCOOP.

MR. CONNELLY: They were navigational lights. I believe both the –

THE COURT: What is the significance of the crew wearing life jackets, if any?

MR. CONNELLY: I believe they –

THE COURT: They wear life jackets on the SUPER SCOOP, don't they?

MR. CONNELLY: Your Honor, I think if this was tied up to the shore and they were out in six feet of water, they would be wearing life jackets.

THE COURT: No significance.

MR. CONNELLY: No significance, according to the lower cases. I don't know whether off hand whether DiGiovanni was mentioned by the court because I don't think that is significant.

THE COURT: All right. So you say it has no means of – it moves the same way by cables and anchors. Has no – has only navigational lights and no other navigational aids?

[12] MR. CONNELLY: Right. It has nautical equipment, so does the BETTY F in DiGiovanni. It's inspected by the coast guard, but so was the barge in DiGiovanni.

Both as I mentioned before were barges bearing crane and both had to be towed to the site by tugboat over a period. I am not sure whether the DiGiovanni barge had a bow or not, which helps it being towed, but both had to be towed long distances and were.

THE COURT: The Super Scoop has a rig bow?

MR. CONNELLY: Yes.

THE COURT: The issue though is in this case is – the only issue here is whether the Super Scoop [sic] is a vessel; there is no –

MR. CONNELLY: Right.

THE COURT: – there is no real issue about whether Mr. Stewart's connection with the vessel –

MR. CONNELLY: No. And then I don't need to argue that in any detail. My brother in both briefs cites cases discussing that issue which isn't really an issue at all in this case. There is no – we are not claiming that he wasn't tied to the SUPER SCOOP, whether the vessel is the issue.

Under DiGiovanni, the rule is if a barge or other float's purpose or primary business is not navigation or

commerce, then the work is assigned thereto for its short [13] enterprise ought to be considered seaman only when it's actual navigation or transit.

THE COURT: That is the part I think has been overruled by the Supreme Court but that –

MR. CONNELLY: That's the second part, but the primary purpose, Your Honor, of this – I don't think this really can be argued. The primary purpose is not navigation or commerce. The primary purpose even though my brother argued it had to be brought in with the crane on it so it would – that argument is that it was bringing equipment in, the crane, although it's permanently attached.

The primary purpose is dredging; that is all this SUPER SCOOP is used for. The primary purpose is not navigation or commerce. It's simply dredging.

THE COURT: What is the crane for?

MR. CONNELLY: That crane is only for dredging. It has a bucket attached to it, and its only purpose for this crane as far as I know in the Super Scoop is never used for anything else like –

THE COURT: You say it has a crane on it and, therefore, it's like the BETTY F in the DiGiovanni case in the sense that the mere fact that it was brought to – it bought this crane out to the bridging site as you would say, an incidental to its purpose?

MR. CONNELLY: Yes, Your Honor, correct.

[14] THE COURT: So the mere fact that it hauled that crane you say has no – it makes –

MR. CONNELLY: As it happens the SUPER SCOOP was built – when it was built, the crane was built on it, and it never has been removed from it, so it's part.

THE COURT: You say it's not – you say it's not even equipment. It's really part of the Super Scoop itself?

MR. CONNELLY: Yes, Your Honor, even if you decided that it was equipment which I believe my brother might argue that is incidental compared to the primary business.

THE COURT: Do they bring people out there on the SUPER SCOOP?

MR. CONNELLY: When it's being towed, no people can be on board. They have to bring people out by boat to get to it.

THE COURT: And they come out on those work boats, scows?

MR. CONNELLY: Right. Referred to as work boats so we don't get them confused with the scows which when they talk about scows in this case, this job, it's the scows, they bring materials about 5 miles out to dump.

THE COURT: So any other equipment on the SUPER SCOOP, other than the crane?

MR. CONNELLY: The crane is – takes up most of [15] it. There are some lights. There are the wrench engines that drive the anchors. There is no place to sleep, but this is a place to get like a – they call it a tub to get some coffee and things of that nature, and – but there is no place to sleep. There is no quarters for bunking. There is no shower facility on board.

THE COURT: Bathroom?

MR. CONNELLY: There is a bathroom. There would be a bathroom. I don't know comparing that to the barge in DiGiovanni, whether there is a bathroom on that as well.

THE COURT: Okay.

MR. CONNELLY: Give me one second, Your Honor.

The DiGiovanni court argued that the movement of the Barge about the pier and they did talk about the movement because it did have to be moved or working convenience was hardly navigation or commerce. I think the court would decide that the movement, the slight movement on – for dredging purposes, the SUPER SCOOP was again, hardly navigation or commerce.

The DiGiovanni court ruled that in all respects, it met the commonly understood characteristics of the vessel, the BETTY F, but held that it was not a vessel for purposes of the Jones Act, and as a matter of law, is entitled to – the plaintiff in that case was entitled to no Jones Act recovery.

[16] Now, my brother mentioned that the court – I had cited a case Tonnesen versus Yonkers, Eastern District of New York, where they adopted DiGiovanni; that has been overturned. I had cited another case Hatch which is a Six [sic] Circuit case, and that case hasn't been overturned. My brother mentioned that the Hatch case involved not a barge, but something more akin to a dry dock. Looking at the Hatch case, this is the Sixth Circuit, fairly recent.

THE COURT: I am not sure all that matters. If DiGiovanni is good law in the First Circuit and you say

this case is controlled by DiGiovanni, that is as far as I need to look; isn't that right?

MR. CONNELLY: Yes, Your Honor, that is true, and that would be our argument as well. I was anticipating my brother citing cases that are saying that DiGiovanni is not good law. We are not going to follow it and realize he was going to do that because I cited cases saying other circuits are starting to follow it, but the truth of the matter is that the First Circuit – that is the law in the First Circuit, and it has not been changed, and it was cited, DiGiovanni was cited by the U.S. Supreme Court and pretty much left it alone. They didn't overrule it for the principles that we believe guide today.

THE COURT: How about the Long Shore Act?

MR. CONNELLY: The Long Shore Act, Your Honor, in [17] this case, again, the defendants are relying on one case really, so it makes the argument a little easier. In the Jones Act, you rely on DiGiovanni, The Long Shore, we rely on another recent First Circuit case, Morehead versus Atkinson-Kiewit, a 1996 case. Dutra simply is subject to suit in its capacity as vessel owner to that situation.

THE COURT: Let me see if I can get to the heart of where it seems to be the issue as far as all concerned in this case. Mr. Stewart says there is a missing railing on this thing –

MR. CONNELLY: Yes.

THE COURT: – the scow I guess it is now. And he fell – one of the reasons he fell was because of the missing railing. Doesn't that create an issue of fact having to do with whether the ship as it was turned over from the

vessel owner to the employer, was in appropriate and safe condition?

MR. CONNELLY: That might, Your Honor, given the time frame, also, the evidence would be they removed that railing to get – to take the hatch out, to get the engine down below.

THE COURT: Is that the evidence before me now though? Now right – that may be the evidence at trial, but I mean at the moment the state of the record is such that I don't know how that railing got to be moved.

[18] MR. CONNELLY: I don't know, Your Honor, whether I addressed that in the facts.

THE COURT: I don't remember seeing you addressing the railing, but don't we have an issue of fact about maybe you can resolve it quickly at trial, but maybe there is an issue of fact about the railing and the condition of the scow when the thing was turned over?

MR. CONNELLY: I didn't know that was an issue, Your Honor. You raised that issue.

THE COURT: The plaintiff says that is what happened, that one of the reasons he fell in is because it wasn't a railing there.

MR. CONNELLY: Yes, Your Honor, but there has been no issue to when the railing was taken out of why it wasn't there.

THE COURT: Except that is an issue, that is an issue it seems to me that is implicit in the Morehead case when the Morehead has this – the Morehead calls this a schizophrenia between the vessel as vessel – between the

vessel, owner of the vessel, the employer – when an employer is two people, the employer is an employer, and the employer is also the vessel owner, one of the issues is the condition of the vessel at the time it is turned over, and so it seems to me the railing is an issue or it's not only an issue at the time it is turned over, it's whether the [19] Morehead says that the owner may also have some duty if the owner is still controlling some part of the vessel qui omne (phonetic), so that the missing railing seems to be an issue both in terms of – both of the turnover and in terms of who controls that part of the scow, don't you think?

MR. CONNELLY: Well, Your Honor, I don't think there is any evidence my brother has of any evidence as to when the railing was taken out as far as when it was – what the condition was when it was turned over. All we know is that at the time, it's definitely an issue of fact in dispute as to whether or not the railing was there at the time that he fail [sic]. As far as –

THE COURT: Is there an issue of dispute whether it was there or not there?

MR. CONNELLY: Yes, Your Honor.

THE COURT: Okay.

MR. CONNELLY: But as far as comparing to the Morehead case, the same argument we made with whether or not this hatch was opened when the ship was turned over, the hatch was opened for a long period of time according to the facts in the Morehead case, and had been left open because they expected somebody to come aboard.

THE COURT: I don't have any of that; I don't have those facts before me. I don't have how long the railing was opened, how obvious it was at that time the

railing was [20] open. I mean I simply don't know what the – whether the railing was open at the time the ship was turned over or whether Dutra controlled that part of the ship as owner or not. I guess I just don't have that.

The defendant's –

MR. CONNELLY: Well, Your Honor, the defendant's argument is that the control they had over that area, be it the hatch, be it the railing, and it was as employer and not as vessel owner.

MR. BARISH: Similar to the facts in the Morehead case, they were going to – down below to work on the engine for the scow. He was – his job is similar to the plaintiff in Morehead, had various roles. One of them was mainly to grease everything on the ship much of which was engines, had nothing to do with moving the SUPER SCOOP, and there were no engines that he could work on that could help move the scow. The only thing he was working on in that time was that engine which opened and shut it, a simple – a part of the dredging operation.

In the Morehead case, they discussed vessel ownership versus basically construction company owner or employer as construction company, and in our case we don't have a construction company. We have dredging operation versus vessel owner. This scow had been under their control for a period of time, Your Honor. There is no, I don't [21] think, issue as far as that is concerned, and they had decided they needed to work on that engine to get it working again and the condition on the engine and the means of getting to that engine were part of the dredging operation, had nothing to do with the movement of navigational movement of the scow or of the SUPER SCOOP for that purpose.

So again, Your Honor, we think it's almost identical to the facts of the Morehead case, whether or not it was just the – if it was caused because the hatch was open or it was caused because the railing wasn't there. The issue is the same, is that they removed it. If they didn't take that railing out as employer, as dredging company.

THE COURT: That seems to be the issue, whether – who moved it and when it was moved seems to be the issue.

MR. CONNELLY: Well, there is no – and I believe this was argued in a similar case to the Morehead case, people hired to work on the SUPER SCOOP. There was not a separate crew.

THE COURT: I understand that.

MR. CONNELLY: Everyone there was engaged in dredging, and they had some duties, you know, to move the SUPER SCOOP, 16, 30 feet, six times a day, but their main purpose was dredging and the only purpose of this engine, and of course the means to get to the engine which may have caused this accident, was dredging.

[22] THE COURT: Okay. All right.

MR. CONNELLY: Thank you.

THE COURT: Thank you sir.

All right, sir.

MR. BARISH: Yes. If I may, Your Honor.

THE COURT: Why don't you start where he left off if you wouldn't mind.

MR. BARISH: You mean with the –

THE COURT: Yes.

MR. BARISH: That is clearly a question of fact for a jury. The problem with his argument is that Dutra was always in control of this vessel, so that anything that happened under the ship owner's watch –

THE COURT: Why do you say that? Dutra was also the employer of these folks.

MR. BARISH: Yes, but the problem – the problem is that the question of fact that the court raised, namely when the railing was removed, is a significant one, and it's our position that it was removed prior to this man's going onto the scow.

THE COURT: If it were removed prior to his going onto the scow and it was always removed, then it becomes pretty obvious that it is not there.

MR. BARISH: Yes.

THE COURT: And it's pretty obvious. Why isn't [23] that the employer?

MR. BARISH: That is why we are getting into the factual problem now because it was not always removed. It was removed shortly before he went onto the scow. But I am not really, Your Honor, if I may, I am not really – the 905 argument is just – was just a fallback position. I am not really opposing their motion for summary judgement on that basis.

THE COURT: Well, it may be. I wouldn't give it up.

MR. BARISH: I am not.

THE COURT: I haven't decided the seaman question.

MR. BARISH: I am not giving it up but, Your Honor, if I may, I think these facts so clearly create an issue of fact for the jury, quite frankly, I guess I am getting carried away, but I think I have a better shot at getting summary judgement on the seaman issue than he does.

THE COURT: Well, tell me how you think that.

MR. BARISH: Well, I think that because there is no question as he admits that my client spent 99 percent of his time aboard the dredge, which happens to be a vessel.

THE COURT: He says that is not an issue in the case.

MR. BARISH: Right.

THE COURT: He says the only issue in the case is [24] whether that dredge –

MR. BARISH: Dredge –

THE COURT: – is a vessel.

MR. BARISH: That is simple, Your Honor. The difference between a work platform which DiGiovanni ruled that that particular setup was and a vessel is that the vessel plies on navigable water which this one did, that it carries crew and machinery which this one did.

THE COURT: This vessel carries crew and machinery. Where does it carry them to and from?

MR. BARISH: Well, they were brought – the machinery was on – the machinery is part of the dredge.

THE COURT: Right.

MR. BARISH: The crew was brought in and out by way of –

THE COURT: Another boat.

MR. BARISH: By way of another boat which is part of the fleet. See, one of the things that –

THE COURT: Part of the Dutra fleet?

MR. BARISH: Pardon me.

THE COURT: Is part of the Dutra fleet?

MR. BARISH: Yes.

MR. BARISH: Yes.

1. The things that the defendant fails to recognize is that we are talking about a fleet of vessels, and the fleet of vessels are set forth in the Lawrence case, [25] the fleet of vessels is what governs. That is the concept of the fleet doctrine which emanated from the Fifth Circuit and has been adopt by the Supreme Court of the United States.

THE COURT: But there the issue – even if you bring in a fleet, the issue isn't whether he worked on that fleet because the fleet you are talking about is the fleet that brings him to –

MR. BARISH: That vessel is parked in the –

THE COURT: Let met just finish this.

MR. BARISH: Yes.

THE COURT: The fleet you are talking about is the fleet that comes from the shore to the dredge.

MR. BARISH: Yes.

THE COURT: Now, there is no issue as far as I can – as far as I read the paper, there is no issue about him working on those boats.

MR. BARISH: No.

THE COURT: He worked on the scow, that thing where he fell and the SUPER SCOOP, and so the question is even if there is a fleet –

MR. BARISH: Right.

THE COURT: It's a connection – it is his connection to the fleet other than as a passenger. He is a passenger on those work boats.

[26] MR. BARISH: No. The fleet for this purpose is the scow, the dredge. You see, what's happened here, Your Honor, if I may.

THE COURT: Yes, but before you leave that point, you say it's the scow and the dredge.

MR. BARISH: And the other vessels, but I don't have to get there. Can I just tell you what I really think this is about?

THE COURT: Yes.

MR. BARISH: This is about a false analogy. This is not about whether DiGiovanni applies or doesn't apply. We are assuming DiGiovanni applies.

We are saying that the cases make it clear that DiGiovanni shouldn't be extended.

Now, in this case, in DiGiovanni, we had a barge that was MO, secured to the bridge by spuds, did not engage in any navigable function such as the transportation of crew supplies or equipment and was the – decided to be a work platform. The gentleman who was involved – DiGiovanni had never done any seaman's work, had never been at sea. This case is entirely the opposite.

In DiGiovanni, we had a piece of equipment secured to a bridge, building the bridge. It's a false analogy to say that this dredge here, that these dredgers were engaged in building the tunnel. These dredges were engaged in [27] dredging, deepening the channel which has always been seaman's work.

THE COURT: Let me just – what DiGiovanni says, Mr. Barish, is that the purpose of the instrumentality, primary purpose, to transportation of people and equipment.

MR. BARISH: Right.

THE COURT: Now, where does the SUPER SCOOP fit into that construct?

MR. BARISH: Well, first of all, the SUPER SCOOP does have equipment and does transport equipment and does transport supplies and does transport, quite contrary to what was said, and does transport people.

THE COURT: Where does it say that in your papers that it does that? All I see in the papers, that it does dredging, and it has this crane on it.

MR. BARISH: Okay. Fine. They move the SUPER SCOOP from one place where it dug down to widen the channel to another place where it digs down and widens the channel to another place, doing it according to the defendant's own papers, no less than six times a day.

Now, when that vessel is moving, it is moving with the crew aboard it. The problem with DiGiovanni as he has stated it, is that DiGiovanni is not one ruling. DiGiovanni is two rulings. DiGiovanni says that a vessel –

THE COURT: Can I stop you one minute –

[28] MR. BARISH: Yes.

THE COURT: – before you go on.

You say it moves with crew on it?

MR. BARISH: Sure.

THE COURT: And he says it doesn't move with crew on it.

MR. BARISH: He is wrong. Calling me his brother doesn't alter the fact that he is wrong.

THE COURT: Is there a dispute about whether there is people on this thing?

MR. CONNELLY: Your Honor, as I believe was cited in my brief, and when I say cited, to various deposition transcripts, the vessel, the SUPER SCOOP moves about six times a day, about 30 feet each time; that is it. It's digging a channel across. That is where it moves. It's going to be towed any distance, people are not on it.

MR. BARISH: But when it's moved, Your Honor, the people are on it.

MR. CONNELLY: For those 30 feet, for those 30 feet or moving to the next digging spot, they are not going around the harbor picking spots. They are digging in a line; that is why as stated in the deposition of at least I think two people, I think possibly three, it moves about 30 feet at most, six times a day, 30 feet in the same line, not moving around all the harbor digging holes everywhere.

[29] MR. BARISH: Your Honor, it's been admitted these people are aboard that vessel 12 or 13 hours a day, and when it moves, they move with it.

(Pause.)

THE COURT: Okay. Go ahead, Mr. Barish.

MR. BARISH: As I started to say, Your Honor, DiGiovanni is not one ruling. It's two rulings. DiGiovanni says that if a barge does not engage in transportation, does not carry supplies, does not carry equipment for the maritime purpose for which it is being used, then a member of – a worker on that barge can only be deemed to be injured on a vessel in navigation when the vessel is actually moving.

We don't get to that second issue. That second issue isn't here, because the first issue in DiGiovanni is that this vessel was on navigable waters, moving around on navigable waters, carrying crew, carrying equipment, and therefore, was not a work barge secured to land.

The second aspect of DiGiovanni that deals with the vessel has to be moving only comes into play, Your Honor, if the vessel has – is not a vessel in navigation. If the vessel is tied to the land as in – secured to the land as in DiGiovanni or secured to pilings as in Hatch, and the man is not engaged in maritime work at all, he is standing on

the pier holding a line, then he can be a [30] maritime worker or a seaman only in the situation where the vessel is actually moving and he is aboard it. But once it's established that the vessel is on navigable waters, that the vessel does engage in an navigable endeavor, dredging has always been a – determined to be a navigable – dredging has always been deemed to be seamen's work.

THE COURT: Mr. Barish, why isn't this movement that you are talking about –

MR. BARISH: Pardon me.

THE COURT: Why isn't this movement, the 30 feet, six times a day just incidental to its primary purpose which is dredging?

MR. BARISH: Right.

THE COURT: Why isn't it? I mean if we were talking about the boats that bring these men out to the SUPER SCOOP, we would say of course it seems to me, but the primary purpose of those boats is to transport people. In the case of the SUPER SCOOP, they happen to be there, because that is their work, and you have to move the thing to get it to do the dredging operation. So why isn't it the primary purpose of the SUPER SCOOP dredging, and that movement is just incidental to the dredging?

MR. BARISH: The primary purpose of the SUPER SCOOP is dredging.

[31] THE COURT: That's right.

MR. BARISH: Dredging is dredging.

THE COURT: If you make that – if that is what you say, then you lose, because DiGiovanni – excuse me.

Because DiGiovanni says the primary purpose must be transportation.

MR. BARISH: No, Your Honor.

THE COURT: It don't say that?

MR. BARISH: No, it don't say that.

THE COURT: Wait just a minute. Let me get the case out and see if I can read that part to you.

MR. BARISH: Read the part where it says that the vessel –

THE COURT: I will read the part where it says the primary purpose.

MR. BARISH: Any travel such as transportation of crew supplies or equipment. The barge is equipment.

THE COURT: Let me just see here.

MR. CONNELLY: If I may, Your Honor, Page 1123.

THE COURT: 1123.

MR. BARISH: What do you have, a one sentence scribner?

THE COURT: 1123.

MR. CONNELLY: That is the page I had cited in my brief, Your Honor.

[32] THE COURT: In sum if a barge or other float's purpose for primary business is not navigation or commerce, then workers assigned thereto for a short

enterprise are to be considered seamen only when it's in actual transit.

Now, if you tell me, Mr. Barish –

MR. BARISH: Yes, sir.

THE COURT: – the primary purpose of this float is dredging –

MR. BARISH: Your Honor. if I may –

THE COURT: I haven't finish the question yet, Mr. Barrack [sic]. Do you want to wait until I finish?

MR. BARISH: Yes.

THE COURT: I'd appreciate it.

MR. BARISH: I will.

THE COURT: All right. If you tell me that the primary purpose of this float is dredging, then by the definition of DiGiovanni, it is not a vessel, because it says that the primary purpose must be navigational commerce.

MR. BARISH: Yes. That means that a vessel must be in navigation. It doesn't mean it has to be traveling.

THE COURT: No, that is not what it says. What I have just said, what I have just read to you is that:

In sum if a barge or other float's purpose or primary business is not navigational commerce, then workers assigned thereto for a short enterprise are to be considered [33] seaman only when it is in actual navigation.

MR. BARISH: Yes. Your Honor –

THE COURT: This case does in fact take into account the actual navigation. It says its primary purpose is something else. Tell me that is not what DiGiovanni says.

MR. BARISH: Well, in the first place, it's not what it says.

THE COURT: Listen. DiGiovanni –

MR. BARISH: In the second place –

THE COURT: Just a minute. Let me –

MR. BARISH: – navigation, Your Honor.

THE COURT: DiGiovanni also says floating is not enough.

MR. BARISH: That's right. But when you are –

THE COURT: Nor is capability of navigation across navigable waters enough.

MR. BARISH: That's right.

THE COURT: That is what it says.

MR. BARISH: And I agree. But what we are doing here is dredging which is aiding navigation and commerce.

THE COURT: That is not what this case says. This case says:

> "Whether it is designed or used primarily for the transportation of cargo, equipment [34] or persons across navigable waters."

MR. BARISH: Right. Okay. That is it. That the test is did this vessel engage in a navigable function?

THE COURT: That's not what – I just read to you what the test was.

MR. BARISH: No. Such as transportation of crew, supplies or equipment, and that is what this vessel did.

THE COURT: You acknowledged to me just a few minutes ago in my hearing, that the primary purpose of this vessel, of this float was dredging.

MR. BARISH: Yes. But in order to dredge –

THE COURT: Excuse me. Excuse me.

MR. BARISH: But –

THE COURT: Excuse me.

THE COURT: Excuse me.

The case DiGiovanni says the primary purpose for a float to be a vessel is the transportation of cargo, equipment or persons, not dredging. It doesn't say anything about dredging.

MR. BARISH: That is because DiGiovanni didn't have anything to do with dredging.

THE COURT: It doesn't have anything to do with dredging.

MR. BARISH: DiGiovanni dealt with a vessel that was secured to a dock. You cannot dredge, you cannot dredge without having a vessel which is in navigation that carries [35] a crew, carries cranes, and therefore, that vessel is a vessel in navigation as distinguished from the work platform which is secured to the dock.

This vessel we didn't have to worry about whether it could be moved out in navigable waters. It was at navigable waters. It was being moved.

THE COURT: The case says that doesn't matter. The case doesn't say – the case says that the capability of moving across navigable water is not enough. It says that. I am looking right at it.

MR. BARISH: Okay.

THE COURT: It says floating is not enough, nor is capability of movement across navigable waters.

Mr. Connelly, do you have anything else you want to say about this?

MR. CONNELLY: Not really, Your Honor. I did make a mistake. The BETTY F in DiGiovanni did have a rig bow as well and a brake stern, but I misspoke it.

THE COURT: Yes.

MR. BARISH: Yes. Your Honor, I don't know how I can express this any differently than I did. The barge in this case was engaging in a navigable function. The navigable function was transporting the crew, transporting equipment. That is the difference between a barge and a work platform.

[36] THE COURT: Mr. Barish, you have changed your position. Your position when I asked you a minute ago was this barge or this float was engaged in its primary purpose was in dredging, that is what you told me; didn't you tell me that?

MR. BARISH: But in order to perform off shore dredging, you have to be able to transport the people and

the equipment over navigable waters, and that is what the test is. You can't compare DiGiovanni stuck to a bridge with that.

THE COURT: The test is its primary purpose, not the fact that it can do that.

MR. BARISH: You are misunderstanding me, Your Honor.

THE COURT: Thank you very much. I appreciate that, and I deny your – I am going to deny –

MR. BARISH: It's my fault.

THE COURT: I am going to grant the motion for summary judgement with respect to the – with respect to the seaman status, the motion is granted. It's denied with respect to the Long Shore Act, and we are done.

Thank you very much.

MR. CONNELLY: Thank you, Your Honor.

THE COURT: Thank you.

MR. BARISH: Right. Your Honor, we will be [37] appealing this, immediately.

THE COURT: I am sure you are.

MR. BARISH: Is that okay?

THE COURT: It's not up to me. You have to go to trial because the First Circuit is going to have to deal with that. Let me just say, explain to you my reason. My reason is that Mr. Barish explained to me that this float, the primary purpose of this float was dredging. The DiGiovanni case says that the primary purpose in order to

make a vessel a float – a vessel, the primary purpose must be it's transportation of cargo or equipment.

MR. BARISH: Yes.

THE COURT: And not only what you say but also the record shows that the primary purpose of this thing, of this SUPER SCOOP is dredging, not transportation.

The fact that it moves people across the water is incidental to its primary purpose, and for that reason, I am granting the summary judgement motion with respect to the seaman status.

With respect to the Long Shore Act, I think there is a question about when the railing was up and whether that was a responsibility of the owner or responsibility of the employer.

Thank you very much.

MR. BARISH: Thank you, Your Honor.

[38] MR. CONNELLY: Thank you, Your Honor.

THE CLERK: All rise.

(Recess.)

REPORTER'S CERTIFICATE

I, TERI CELESTE GIBSON, Certified Shorthand Reporter, do hereby certify that the foregoing pages 1 through 38, are a true and accurate transcription of my stenographic notes taken in the above-entitled hearing,

prepared to the best of my knowledge, skill, and ability at the time and place aforementioned.

TERI CELESTE GIBSON, CSR DATE
OFFICIAL COURT REPORTER

This certificate only applies to transcripts produced, copied, and signed by Teri Celeste Gibson, Official Court Reporter.

APPENDIX F

1 U.S.C. § 3. "Vessel" as including all means of water transportation

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

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46 U.S.C. App. § 688.

(a) Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) (1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred –

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources – including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by (a) vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person –

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

* * *

---

33 U.S.C. § 902.

When used in this chapter –

* * *

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include –

* * *

(G) a master or member of a crew of any vessel;

* * *

(2)

No. 03-814

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In The

Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The petitioner's formulation of the issue is incorrect. The questions presented by the petition are as follows:

1. Whether the First Circuit correctly held that a barge that is equipped with a dredge, has no effective means of propulsion, no living quarters, and is used only as a platform for dredging the ocean floor is not a vessel within the meaning of the Jones Act?

2. Whether the petitioner has failed to carry his burden of providing a compelling reason for this Court to disturb the First Circuit's decision and legislate a new definition of "vessel" for purposes of the Jones Act?

STATEMENT REGARDING PARTIES

All parties to the proceeding are listed in the caption of the case.

STATEMENT PURSUANT TO RULE 29.6

The respondent Dutra Construction Company, Inc. is a California corporation and wholly owned subsidiary of The Dutra Group, a California corporation.

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STATEMENT OF THE CASE

The petitioner's statement of the case is incomplete and misleading because it does not mention the following undisputed facts:

- The Superscoop had no sleeping or living quarters.

- The Superscoop has navigational lights because the Coast Guard requires any work platform, stationary or otherwise, located in any part of Boston Harbor to maintain lighting conforming to Coast Guard requirements for visibility and color. Dutra was required to put lights on pipelines, ranges, and markers. The Superscoop's lights were unrelated to navigation.

- The Coast Guard issued the Superscoop a Certificate of Inspection. Pursuant to the Certificate, when the Superscoop is being towed to a job site no persons are allowed to be on it. When the Superscoop is on the ocean, it may only be moved if it is unmanned. The only time the Superscoop is being "navigated," no one is allowed on it.

- The global positioning system on the Superscoop has never been used to "navigate a planned route." The Superscoop cannot propel itself more than a few feet. Any route planning is done by the tug boat assigned to transport the dredge to the next work site. The global positioning system is used only to pinpoint the precise spot where the dredge's bucket is to scoop up sediment. While dredging, the Scoop inches along digging a ditch and is at all times attached to the harbor floor. The Superscoop will be moved a short distance approximately six times during a twenty-four hour period, unless the dredging is slowed due to ledge. Each move takes approximately five minutes. The total distance moved in a twenty-four hour period is

thirty to fifty feet. At the time of the petitioner's accident, the Superscoop was fully anchored and stationary.

- During its stay in Boston the Superscoop's sole job was to dig the trench. It remained at this one location a short distance from the East Boston/South Boston shore.

- The petitioner first set foot on the Superscoop after it had arrived in Boston Harbor. This was the only time he had ever worked for Dutra. He was not an employee of Dutra and had no ties to the Superscoop when the dredge was transported to Boston. His employment with Dutra was scheduled to end before the Superscoop left Boston.

- The petitioner fell through an open hatch after being warned that the scow was to be moved. The scow was moved from one side of the Superscoop to the other before the accident occurred, placing the petitioner on further notice that it was necessary to hold on. The petitioner was aware that the railing around the open hatch had been removed in order to replace the engine upon which the petitioner was working.

REASONS FOR DENYING CERTIORARI

I. THE FIRST CIRCUIT'S APPROACH TO DETERMINING "VESSEL" STATUS UNDER THE JONES ACT IS WIDELY FOLLOWED.

The petitioner correctly points out that there is disagreement between the circuits as to what constitutes a "vessel" within the meaning of the Jones Act. But that is not particularly surprising. The statute does not define the key terms "seaman" or "vessel." Disagreement between courts has been a hallmark of Jones Act jurisprudence for

many years. This Court acknowledged this reality in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) without apparent concern, noting that differences between lower courts as to Jones Act construction represented "simply different ways of getting to the same basic point. . . . " *Id.* at 369-370.

What the petitioner does not mention but that should be emphasized is that the First Circuit's standard on this question, first adopted in *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (CA1 1992), *cert. denied*, 506 U.S. 827 (1992) and reaffirmed in the opinion below, *Stewart v. Dutra Const. Co., Inc.*, 230 F.3d 461 (CA1 2000) (*Stewart I*), is part of an opinion that has been cited with approval by this Court, and is a framework that is widely followed by what may be a majority of jurisdictions around the country to have considered the question. *See Chandris*, 515 U.S. at 373; *Hatch v. Durocher Dock and Dredge, Inc.*, 33 F.3d 545, 548 (CA6 1994) (following *DiGiovanni*); *Katheriner v. UNISEA, Inc.*, 975 F.2d 657, 661 (CA9 1992) (relying on *DiGiovanni*); *Gipson v. Kajima Eng. and Const. Inc.*, 972 F.Supp. 537, 542 (C.D. Cal. 1997) (following *DiGiovanni*); *Ketzel v. Mississippi Riverboat Amusement, Ltd.*, 867 F.Supp. 1260, 1263-64 (S.D. Miss. 1994) (following *DiGiovanni*); *Taylor v. Cooper River Const.*, 830 F.Supp. 300, 302-304 (D.S. C. 1993) (following *DiGiovanni*); *Newsom v. Continental Grain Co.*, 820 F.Supp. 1187, 1189 (D. Minn. 1993) (citing *DiGiovanni* with approval); *Johnson v. ADM/Growmark River Sys., Inc.*, 295 Ill. App. 3d 436, 442-44, 693 N.E.2d 447, 480-82 (Ill. App. 1998) (citing *DiGiovanni* with approval); *Leggett v. Sovran Leasing Corp.*, 909 S.W.2d 664, 665-67 (Mo. 1995) (citing *DiGiovanni* with approval); *Spears v. Kajima Eng. &*

Const'n, Inc., 101 Cal. App. 4th 466, 475-78 (2002) (following *DiGiovanni*); *Gault v. Modern Continental/Roadway Const'n Co.*, 100 Cal. App. 4th 991, 1000-1002 (2002) (following *DiGiovanni*).

II. THE FIRST CIRCUIT'S DECISIONS IN *DIGIOVANNI* AND *STEWART I* ARE NOT IN CONFLICT WITH THIS COURT'S DECISIONS.

A. *Stewart I* Does Not Contradict This Court's LHWCA Decisions.

This argument by the petitioner is an effort to create an issue where none exists. The petitioner does not identify a single specific conflict between a decision of this Court and *Stewart I*. Moreover, in framing this point the petitioner invokes the First Circuit's decision on the LHWCA aspect of the case (*Stewart II*), as to which the petitioner does not even seek review in this Court.

The petitioner fails to cite a single case in which this Court grappled with the implications of the exclusivity of the Jones Act and the LHWCA. While vessel status is a prerequisite for coverage under the Jones Act, it is not a requirement for protection under the LHWCA. Under the LHWCA the term "employee" means any person engaged in maritime employment, including any longshoreman and any harbor worker. 33 U.S.C. § 902(3). Congress intended the coverage under the LHWCA to be broad. Vessel status is a nonissue for those seeking coverage under the LHWCA.

As is the case in most LHWCA claims, in *Stewart II* whether the Superscoop was a vessel was not disputed and thus a nonissue in determining coverage under 33 U.S.C.

§ 905(b). It does not follow that the term vessel must have precisely the same meaning in both contexts. Like "seamen" the word "vessel" has a variable meaning in law applicable to the particular statute to which the legislature applied it. *See* Martin J. Norris, *The Law of Maritime Personal Injuries*, Chapt. 4 (4th ed. 2003). "Vessel" and "seamen" are given varying definitions in a number of statutes. For example, in *Presley v. Vessel Caribbean Seal*, 709 F.2d 406 (CA5 1983) scientific personnel were considered seamen under the general maritime law but not under the Jones Act. The Court held that 45 U.S.C. §§ 433 and 434 divest an oceanographic research vessel of its status as a vessel only for Jones Act purposes, but it remains a vessel for other purposes, including the warranty of seaworthiness.

In *Dole v. Petroleum Treaters, Inc.*, 876 F.2d 518 (CA5 1989) the Fifth Circuit held that an employee can be a "nonseamen" under the meaning of the Fair Labor Standards Act even if entitled to seamen status under the Jones Act. The Court wrote: "It is well established that the term under the two acts has different independent meanings." *Id.* The tension the petitioner alleges between *Stewart I* and this Court's LHWCA decisions does not exist.

B. The First Circuit's Rule is Perfectly Consistent With This Court's *Chandris* Decision.

In *Chandris* this Court addressed the nature of the relationship that a seaman must have with a vessel in order for the Jones Act to apply. In *DiGiovanni* and in *Stewart I*, the First Circuit considered the entirely different question whether a floating platform that supports a crane or a dredge and is not capable of navigation is a

Jones Act vessel. *Chandris* and the First Circuit decisions not only are not "seriously inconsistent," they are apples and oranges. To the extent that *Chandris* and the earlier *DiGiovanni* decision overlap in their relation to the vessel issue, they are consistent. Indeed, as noted above, the *Chandris* Court cited and quoted with approval a portion of *DiGiovanni's* explication of the Jones Act vessel concept. 515 U.S. at 373.

The contention that the First Circuit's vessel standard amounts to a "snapshot" approach is specious. The First Circuit's vessel test looks at the "purpose or primary business" of the float at issue, and in particular at whether the float's business is navigation or commerce. *DiGiovanni*, 959 F.2d at 1123 (quoting *Bernard v. Binnings*, 741 F.2d 824, 829 (CA5 1984)). This approach properly focuses on the general, continuing status and activities of the float, not at some fleeting factors existing only at the instant of injury. In a broad sense, this is the same approach taken by all courts, and is far from a "snapshot" approach.

The petitioner's focus in raising the "snapshot" issue is the second part of the First Circuit's formulation, which *expands* the vessel standard for the *benefit* of injured claimants like the petitioner by granting vessel status to floats that are actually engaged in navigation at the time of injury, even if their primary business or purpose is *not* navigation or commerce. This feature of the First Circuit's formulation does not detract from the test's principal focus on the continuing status and activities of the subject float, and only *broadens* the test for the benefit of claimants. In this way, the First Circuit approach is nuanced and generous, and consonant with the need to avoid a standard

that looks "*only* at the situation . . . at the instant of injury." *Chandris*, 515 U.S. at 363 (emphasis added).

Significantly, the concurring Justices in *Chandris* opined that the Court should not ignore "the critical distinction between work performed aboard ship during a voyage – when the members of the crew encounter 'the perils of the sea' – and maritime work performed on a vessel moored to a dock in a safe harbor." *Id.* at 377. While the *Chandris* Court acknowledged the disadvantages of workers oscillating back and forth between Jones Act coverage and other remedies, it also recognized that seaman status necessarily includes a temporal element. *Id.* at 371. There will always be situations in which an employee's status changes as the nature of his employment changes. As the Court noted, "the myriad circumstances in which men go upon the water confront Courts not with discrete classes of maritime employees, but rather with a spectrum ranging from the blue-water seamen to the land-based longshoreman." *Id.* at 356.

The First Circuit recognized this in *DiGiovanni*:

> That there should be a varying status designation depending on the activity at the moment is not a novel concept. In *Victory Carriers, Inc. v. Law,* 404 U.S. 202, 92 S. Ct. 418, 30 L.Ed.2d 383 (1971), a longshoreman who, because unloading, would have had unseaworthiness recovery under the Jones Act, per *Gutierrez*, for a ship-caused injury, was injured instead using the stevedore's equipment. Recovery was not allowed. We believe our division of responsibility to the activity equally appropriate.

959 F.2d at 1123.

In determining whether an injured employee working on an oil drilling platform was covered by the LHWCA this Court in *Herb's Welding Inc. v. Gray*, 470 U.S. 414 (1985) reasoned that "there will always be a boundary to coverage, and there will always be people who cross it during their employment." *Id.* at 426. This Court thus recognized that if the employer had been doing the same work on the same platform but on the outer continental shelf rather than state waters he would have been covered.

There are many instances in which a temporal approach should be relied upon at least in part to avoid an unfair result. This Court recognized this in *Chandris*. The First Circuit's reliance on a temporal safeguard or exception in the second part of its rule is prudent and consistent with *Chandris*.

C. This Court Has Never Recognized That Dredges are Jones Act Vessels.

The petitioner admits at the outset that this Court "does not appear to have directly addressed the meaning of the term "vessel" (in any context) since 1903." (Pet. at 5) Then, in another breath, the petitioner argues that this Court "recogniz[es]" that dredges in fact are Jones Act vessels. (Pet. at 20-22) This argument is a misleading make weight.

None of the decisions cited by the petitioner, *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), *Gianfala v. Texas Co.*, 350 U.S. 879 (1955), and *Jerome B. Grulant, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), addressed the question presented here. All three cases involved different facts and issues than those here.

In fact, in *Senko*, which petitioner considers "[m]ost directly on point," the Court clarified that "No question has been raised at any time as to whether the dredge involved here had the status of a "vessel" at the time of petitioner's injury." 352 U.S. at 371 n. 1. Further, at least three members of the *Senko* Court did *not* consider the dredge there a vessel. To the dissenting Justices Harlan, Frankfurter, and Burton, the dredge was merely an "earth-removing machine" that was afloat and occasionally pushed from place to place. 352 U.S. at 378.

Likewise, in *Gianfala v. Texas Co.*, 350 U.S. 879 (1955), this Court did not address the issue of vessel status under the Jones Act. Contrary to the petitioner's contention, the Court assumed nothing about the status of the float there. Indeed, vessel status was not raised as an issue in the circuit court cases cited in *Gianfala*. In *Gahagan Construction Comp. v. Armao*, 165 F.2d 301 (CA1 1948), also cited by the petitioner, the court did not address the question whether the dredge was a vessel, because it was not disputed. All of the decisions cited by the petitioner have nothing to do with the instant case.

III. THE PETITIONER HAS FAILED TO PROVIDE ANY COMPELLING REASON JUSTIFYING CERTIORARI.

The petitioner says that this Court should review *Stewart I* because the Jones Act seaman question is important and current jurisprudence creates "serious problems." (Pet. at 22-23) For the following reasons there is no good reason for review by this Court.

A. The Petitioner Wrongly Assumes That Intervention by this Court Will Alleviate Differences Between the Lower Courts.

Underlying the petitioner's contention is the assumption that the promulgation of a national "vessel" test by this Court will eliminate differences between the lower courts and settle disputes over Jones Act coverage once and for all. There is no rational basis for this assumption. In fact, it is highly unlikely that a national vessel standard will be uniformly interpreted and applied from circuit to circuit. The history of the law (not to mention common sense) dictates otherwise. In truth, the current differences between the lower courts stem not so much from differences between the respective courts' articulated standards as from the fact that, in constantly changing factual scenarios, the courts are interpreting and applying in different ways the same essential considerations. The black and white standards are not the issue – it is the varying perspectives of the courts. The notion that a new test created by this Court will change that is wrong.

This Court recognized the need to determine seaman status on a case-by-case basis. The *Chandris* Court reasoned:

> In defining the prerequisites for Jones Act coverage, we think it preferable to focus upon the essence of what it means to be a seaman and to eschew the temptation to create detailed tests to effectuate the congressional purpose, tests that tend to become ends in and of themselves.

515 U.S. at 369. This Court believed that the lower courts as well as employers and maritime workers could benefit from "general principals" as to seaman status. *Id.* at 371. "As we have said, the inquiry into seaman status is of

necessity fact specific." *Id.* Even the Fifth Circuit in the often-cited case *Offshore Co. v. Robison*, 226 F.2d 769 (CA5 1959) acknowledged that any rigid test threatens to come to grief on the facts. *Id.* at 779.

The First Circuit's formulation differs from the Fifth Circuit's in deciding vessel status. Both rules, however, work to determine the real issue: whether the employee is exposed to the special hazards of going to sea. Stewart, who worked on a mostly stationary earth-removing machine and slept in an apartment in East Boston when not on duty, clearly was not.

Review of the cases cited by the petitioner indicates that the circuits are likely to arrive at different results even if forced to follow the same rule. Under the Fifth Circuit's "rule", as clarified in *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (CA5 1998), evaluating the importance of the craft's transportation function *is the key* to determining the craft's status. *Id.* at 351. The First Circuit, if required to follow the *Manuel* rule, likely would conclude that the Superscoop's transportation function was merely incidental and unimportant and once again deny the petitioner's Jones Act claim. It is the Fifth Circuit's expansive application of the rule and not the rule itself that has led to the supposed divergence of opinion with the First Circuit. Other circuit courts have consistently held that where there has been no showing that the alleged "vessel" served a transportation function which was more than incidental to its primary purpose, summary judgment is appropriate. *See Hatch v. Durocher Dock and Dredge, Inc.*, 33 F.3d 545, 547 (CA6 1997).

B. There is No Support for the Claim That the Current State of "Vessel" Jurisprudence Creates "Serious Problems."

Who says that prevailing decisional law on the definition of "vessel" creates "serious problems" for maritime workers, their employers, and their insurers? The petitioner offers no support for the proposition, and it does not stand to reason. Between the Jones Act, LHWCA, and state workers compensation schemes, maritime workers enjoy the widest range of options, protections, and rights available to personal injury claimants anywhere in the country in the event of workplace injury. The petitioner offers no evidence that extant Jones Act "vessel" precedents interfere with those benefits.

As for maritime employers and their insurers (and their attorneys), they have the benefit of extensive statutory and common law authority to guide them. To answer questions regarding whether a particular employee is a seaman or a particular float is a vessel, they need only evaluate the facts in light of the controlling decision in their circuit/state, just as they would for any legal issue (and just as they will have to do if this Court issues a national test). There is no problem here, let alone a sound basis for certiorari.

C. The Issue is Better Left to Congress.

"Because of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes have seen fit to allow, to leave further development to Congress." *Norfolk v. Shipbuilding and Drydock Corp. v. Garris*, 532 U.S. 811,

820 (2001). It is for Congress to decide the policy questions underlying the coverage of the Jones Act, not this Court. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426-427 (1985); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 216 (1971). *See also* David W. Robertson and Michael F. Sturley, *Recent Developments In Admiralty Law At The National Level and In The Fifth and Eleventh Circuits*, 26 Tul. Mar. L.J. 193, 205-206 (2001) (acknowledging the ascendancy of the view that maritime law should be developed by Congress through statue).

There is no reason to make an exception to these principles in this case. If the petitioner is correct that this matter presents an issue of true national significance, it should be addressed by Congress.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 03-814

Supreme Court, U.S.
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In The
Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The respondent seeks to substitute its own version of the facts of this case for the facts actually found by the lower court. To illustrate, the lower court found that "the SUPER SCOOP typically moves once every two hours, covering a distance of thirty to fifty feet." *See* Petitioner's Petition for Writ of Certiorari, App. 17. Conversely, the respondent alleges "the total distance moved in a twenty-four hour period is thirty to fifty feet." *See* Respondent's Brief in Opposition, p. 1, 2. In fact, the Respondent even contradicts its previous position at the Summary Judgment hearing: at that hearing, counsel for the Respondent stated that the SUPER SCOOP moved "about thirty feet at times, about six times per day." App. 41, 51.

In addition to misstating the facts, the Respondent also alleges so-called "facts" in its "Statement of the Case" that are not contained in the record, and were never introduced in evidence at the summary judgment hearing. For example, the lower court found that the SUPER SCOOP had navigation lights, and was required to register and comply with safety regulations issued by the Coast Guard. App. 17. In its opposition, the Respondent alleges for the first time during the entire history of the present case that the lights were not related to navigation. *See* Respondent's Brief, p. 1. This Court should consider the facts contained in the record, not the facts as the Respondent would like them to be.

I. THE FIRST CIRCUIT'S APPROACH TO DETERMINING "VESSEL" STATUS UNDER THE JONES ACT HAS NOT BEEN "WIDELY FOLLOWED"

The First Circuit's current test for vessel status enunciated in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (CA 1)(en banc), cert. denied, 506 U.S. 827 (1992) has created an eight-circuit conflict. *See* Petitioner's Petition for Certiorari, pp. 8-17. The string of cases cited by the Respondent as "citing *DiGiovanni* with approval" are distinguishable. Respondent's Brief at p. 3. One case in the respondent's string, *Chandris v. Latsis*, 515 U.S. 347, 373 (1995) cited *DiGiovanni* only for the proposition that a vessel retains its "vessel" status even while at anchor, berthed, or dockside. The *Chandris* Court never "approved" the *DiGiovanni* test for vessel status, either explicitly or implicitly. *Chandris* clarified the type of relationship that a seaman must have to a vessel; it never addressed the vessel status requirement under the Jones Act. Another case in the respondent's string of cases which the respondent alleges as "citing *DiGiovanni* with approval" actually does the opposite: it cites Chief Judge Torruella's vigorous dissenting opinion with approval. *Leggett v. Sovran Leasing Corp.*, 909 S.W. 2d 664, 665-67 (No. 1995)(holding a barge to be a "vessel," citing the Appendix containing 22 statutory definitions of "vessel," which was referenced in the *DiGiovanni dissenting opinion*).

II. THE FIRST CIRCUIT'S DECISIONS IN *DIGIOVANNI* AND *STEWART* CONFLICT WITH THIS COURT'S DECISIONS

The Respondent states that there is no conflict between cases interpreting the Jones Act and those interpreting the LHWCA because "vessel status is a non-issue

for those seeking coverage under the LHWCA." Respondent's Brief at p. 4. However, the Respondent ignores the plain language of the LHWCA allowing recovery in tort to maritime workers only for *vessel negligence*. 33 U.S.C. Sec. 905(b). The existence of a "vessel" is a necessary prerequisite for a claim for "vessel negligence" under the LHWCA. The existence of a "vessel" is also an essential element in a Jones Act claim. This Court has held on four occasions that the definition of a Jones Act "seaman" is a "master or member of a crew of any vessel" who is excluded from LHWCA coverage: "It is odd but true that the key requirement for Jones Act coverage now appears in another statute." *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991). It follows that the term "vessel" should have the same meaning under the Jones Act and the LHWCA. Yet, the lower court found that the SUPER SCOOP was an LHWCA vessel but not a Jones Act vessel. Permitting inconsistent meanings of the term "vessel" undermines the mutual exclusivity of the two statutes and brings a fundamental incoherence to this Court's delineation of seaman status.

Not only is the Petitioner asking this Court to grant *certiorari* to reconcile the meaning of the term "vessel" in two mutually exclusive and interrelated statutes, i.e., the Jones Act and the LHWCA; a more fundamental problem is the different meaning given to the term "vessel" by the various courts under the same statute, the Jones Act. This has led to inconsistent results based upon indistinguishable facts.

A. Intervention by this Court will Alleviate Differences Between the Lower Courts

The Respondent argues that this Court should not announce one uniform standard for Jones Act vessel status because "the circuits are likely to arrive at different results even if forced to follow the same rule." *See* Respondent's Brief at p. 11. But this Court has recently reaffirmed "the constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 25 (1990). Uniformity in federal maritime law is essential for the commerce of this nation. Decisions upholding the uniformity of maritime law use that criterion as the supreme decision maker. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The lack of a clear "vessel" standard invites unpredictability. The result in a given maritime case should not hinge on the locus of the incident. Until a standard for Jones Act vessel status is articulated, confusion will prevail, litigation will ensue, and unpredictability will usurp uniformity.

In the present case, when the dredge SUPER SCOOP left its home port at Dutra's construction headquarters in California, it was a Jones Act vessel. It retained its vessel status as it sailed through the Panama Canal, and then up the eastern seaboard. A funny thing happened, though, as it put into Boston Harbor: by dint of judicial fiat, the dredge changed, chameleon-like, from a "vessel" to a "work platform." The group of men aboard her were suddenly converted from seamen to construction workers. And Dutra, the owner of the SUPER SCOOP, was no longer a Jones Act employer upon entering the First Circuit's waters: any insurance it carried covering Jones Act risks was nullified.

A clear and uniform standard for the term "vessel" will allow the lower courts to analyze the different facts of each case using the same test and same criteria, and promote consistent results.

B. A Uniform Standard for Jones Act Vessel Status Should be Developed by This Court, not by Congress

The Respondent argues that any expansion of the Jones Act should be left to Congress. Respondent's Brief at p. 12. The Petitioner is not asking this Court to "expand" the Jones Act to allow new claims under the statute. Rather, the Petitioner is asking this Court to announce one uniform standard for "vessel status," which is a key element under the Jones Act. Since the 1990s, this Court has clarified all of the required elements of seamen status except one: the "vessel status" element. The present case provides this Court with an ideal vehicle to complete the task it began in *Wilander, supra.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 03-814

IN THE

Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* MARITIME TRADES DEPARTMENT, AFL-CIO IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No. 03-814

WILLARD STEWART,
Petitioner,

v.

DUTRA CONSTRUCTION CO.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

MOTION OF THE MARITIME TRADES DEPARTMENT, AFL-CIO FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Comes now the Maritime Trades Department (MTD), AFL-CIO, by and through its below-named counsel, and hereby respectfully moves this Court, pursuant to the Court's Rules 21.2(b) and 37.2(b), for leave to file the attached *amicus curiae* brief in support of the petition for a writ of *certiorari* filed by Willard Stewart. Written consent for the filing of this brief was sought from the parties to the case and was obtained from the petitioner, but withheld by the respondent, Dutra Construction Company.

The MTD is one of the Trade and Industrial Departments of the AFL-CIO. It consists of 30 affiliated unions, with 24

port councils, representing workers in the maritime trades and related industries. It promotes employment in the maritime trades through legislative, political and labor action, and assists its affiliates in achieving their goals, including protecting the wages, working conditions, and safety and health of their members. One of the MTD's priorities is to see that injured maritime workers are afforded appropriate relief under the two primary federal statutes that provide for such relief: the Jones Act, 46 U.S.C. App, § 688, and the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C §§ 901-50. The issue raised by petitioner—the conflict in the lower courts over the proper approach to determining which watercraft are vessels for Jones Act purposes—is a crucial one for determining under which statute an injured maritime worker is entitled to relief. Therefore, the MTD, on behalf of the nation's maritime workforce, has an overriding interest in this Court's granting the petition for a writ of *certiorari* and resolving the lower courts' confusion.

It is for these reasons that the MTD respectfully requests that this Court grant this motion for leave to file the attached *amicus curiae* brief in support of the petition for a writ of *certiorari*.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* MARITIME TRADES DEPARTMENT, AFL-CIO IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE*[1]

The Maritime Trades Department (MTD), founded in 1948, is one of the Trade and Industrial Departments of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). It consists of 30 affiliated unions, with 24 port councils, representing workers in the maritime trades and related industries. Included among the MTD's affiliated unions is the International Union of Operating

[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its affiliated unions, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

Engineers (IUOE). The petitioner in this case, Willard Stewart, is a marine engineer and a member of IUOE Local Union No. 25, Marine Division, which represents over 1,600 dredgemen and related workers working on dredges in the Great Lakes, the Atlantic Ocean, the Gulf of Mexico, and their tributaries.

The MTD promotes employment in the maritime trades through legislative, political and labor action, and assists its affiliated unions in achieving their goals, including protecting and improving the wages and working conditions of their members. In this regard, the MTD has a great interest in seeing that injured maritime workers are afforded appropriate relief under the two primary federal statutes that provide such relief: the Jones Act, 46 U.S.C. App. § 688, and the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-50. As the remedies under these two statutes are mutually exclusive, the MTD strongly supports the adoption of uniform, comprehensible rules for determining when each is applicable, to assure injured maritime workers of a clear course to steer in seeking proper compensation and damages for their injuries.

In his petition for a writ of *certiorari*, the petitioner has demonstrated the lower courts' disarray on one aspect of the boundary between the two statutes—the standard to be used in determining whether a watercraft is a "vessel." This issue is of direct concern to *amicus* MTD, its affiliated unions, and their members. The lack of a uniform test for determining vessel status leaves members of the MTD's affiliates subject to changing statutory coverage for their injuries depending on where the watercraft on which they are employed are located. Thus, a marine engineer injured on a dredge in the San Francisco Harbor is likely to be covered by the Jones Act, while the same marine engineer performing the same type of

work on the same dredge will apparently not be covered if the dredge is located in the Boston Harbor. In the inherently mobile world of maritime employment, this state of affairs is clearly untenable and unfair.

The MTD submits this brief *amicus curiae*, in support of the petition, to reiterate the interrelationship of the Jones Act and the LHWCA and the importance, for the jurisprudence under both and the welfare of injured maritime workers, of this Court addressing the question presented by the petitioner.

SUMMARY OF ARGUMENT

The coverage of the Jones Act is limited to seamen, a term not defined in the statute. Disapproving of this Court's extension of Jones Act coverage to land-based stevedores, Congress passed the LHWCA, which provides an exclusive worker's compensation remedy for injuries to land-based maritime workers such as stevedores and specifically excludes from its coverage those maritime workers covered by the Jones Act, defining the exclusion as applying to "a master or member of a crew of any vessel." Subsequent decisions of this Court have equated "seaman" and "a master or member of a crew of any vessel." These same decisions have addressed the type of employment-based relationship to a vessel that is necessary for Jones Act coverage without offering anything other than implicit guidance on the threshold question of which watercraft are Jones Act vessels. Thus, the definition of "seaman" under the Jones Act turns in significant part on the injured maritime worker's relationship to a "vessel," a term actually found—but not usefully defined—in the LHWCA and not dealt with in this Court's decisions to date.

While the reference to terminology found in the LHWCA to determine the scope of Jones Act coverage demonstrates the interrelationship between the two, they are also a pair of *mutually exclusive* complementary remedial statutes. As a

result, for example, an affirmative determination that a particular watercraft is a "vessel" will not only have a positive impact on whether an employee is covered by the Jones Act; it will also have a negative impact on whether the employee is covered by the LHWCA. Under these circumstances, it is clear that a uniform approach to the vessel status question will assist not only in the administration of the Jones Act, but in the administration of the LHWCA as well. This is particularly true because, in actuality, the line between what is Jones Act employment and what is LHWCA employment is not always crystal clear; there is a "zone of uncertainty" between the two. This zone of uncertainty creates difficulties in the administration of both statutes, and the conflict among the circuits over the vessel status question only exacerbates the uncertainty faced by injured maritime workers who are subjected to the vagaries of varying results. Granting the petition here will afford this Court the opportunity to bring clarity to the vessel status question and thereby diminish the zone of uncertainty.

ARGUMENT

Whether A Watercraft Is A "Vessel" Is Critical To Deciding Whether An Injured Maritime Worker Is Entitled To Relief Under The Jones Act Rather Than The LHWCA; This Court's Intervention To Clarify The Approach To Be Used In Answering This Question Will Necessarily Assist In The Proper Administration Of Both Statutes.

In the decision below, the First Circuit determined that petitioner was not entitled to proceed on his Jones Act claim because the dredge *Super Scoop* upon which he worked was not a "vessel in navigation." Before reaching its conclusion, the First Circuit observed that the Justices of this Court have "spoken rather elliptically" concerning what constitutes a "vessel in navigation" and that the Justices "have left the

lower courts to fret, largely unguided, over what is—or is not—a vessel in navigation." (App. 21). In his petition for a writ of *certiorari*, the petitioner has comprehensively detailed the disarray resulting from the lower courts' unguided fretting. He has identified the multiple and vacillating approaches to the vessel status question used by the eight circuits that have considered it, and has correctly described as irreconcilable the different rules they have adopted. This brief will focus on one of the consequences of the conflict among the circuits: the addition of further complexity to the already difficult task of determining where the boundary lies between the Jones Act and the LHWCA and the attendant confusion faced by injured maritime workers seeking to pursue their legal remedies.

A. The Lower Courts' Conflict Over Which Watercraft Are Jones Act "Vessels" Complicates The Jones/LHWCA Demarcation.

Initially, a review of how the question of who is a "seaman" under the Jones Act came to be answered by reference to the LHWCA's exclusion from its coverage of a "master or member of a crew of any vessel" will serve to establish the interrelationship of the two statutes, and set the stage for why the adoption of a uniform approach to whether a watercraft is a "vessel" is necessary for the effective administration of both.

In *The Osceola*, 189 U.S. 158 (1903), this Court summarized the state of seamen's remedies under the general maritime law and held that seamen were excluded from the general maritime negligence remedy. In 1920, Congress passed the Jones Act, which provides a cause of action in negligence for "any seaman" injured "in the course of his employment." 46 U.S.C. App § 688. "The only purpose of the Jones Act was to remove the bar created by *The Osceola*, so that seamen would have the same rights to recover

for negligence as other tort victims." G. Gilmore & C. Black, Law of Admiralty 328-329 (2d ed. 1975), quoted in *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

While the Jones Act removed *The Osceola*'s bar to negligence recoveries by seamen, it did not define the term "seaman." After the passage of the Jones Act, this Court construed "seaman" broadly. *Wilander*, at 347. Specifically, in *International Stevedoring v. Haverty*, 272 U.S. 50 (1926), this Court extended Jones Act coverage to a stevedore engaged in maritime employment, reasoning that: "We can not believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship." *Id.*, at 52.

Congress demonstrated almost immediately that it had something else in mind, and, within six months of the *Haverty* decision, it passed the Longshore and Harbor Workers' Compensation Act (LHWCA) "which provides scheduled compensation (and the exclusive remedy) for injury to a broad range of land-based maritime workers but which also explicitly excludes from its coverage 'a master or member of a crew of any vessel.'" *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355 (1995). This Court, somewhat belatedly, recognized that Congress' intention in passing the LHWCA was to overrule *Haverty* and to make the LHWCA and the Jones Act mutually exclusive.

This recognition came in *Swanson v. Marra Bros.*, 328 U.S. 1 (1946), where the Court considered a Jones Act claim brought by a longshoreman in the employ of a stevedoring company who, while on a pier in the Philadelphia harbor, was injured by a life raft that fell from the vessel he was loading. After reviewing the LHWCA's provisions and that statute's relationship to the Jones Act, the *Swanson* Court stated: "We must take it that the effect of these provisions of the

Longshoremen's Act is to confine the benefits of the Jones Act to *the members of the crew of a vessel plying in navigable waters* and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the Longshoremen's Act." *Id.*, at 7 (emphasis added). Thus, in deciding *Swanson*, this Court referred for the first time to the LHWCA's exclusion of "a master or member of a crew of any vessel," as essentially describing what maritime workers were covered by the Jones Act, i.e., what maritime workers were "seamen."

After *Swanson*, this Court largely left the question of who was a "seaman" under the Jones Act to the lower courts. Then, in a series of cases[2] decided between 1991 and 1997, this Court addressed the disarray resulting from the lower courts' disagreements and defined the Jones Act's scope much more completely. In each instance, this Court stressed the close interpretive relationship between the Jones Act and the LHWCA, as well as their mutual exclusivity, and focused on the nature of the worker's employment relationship to a vessel, while remaining silent on the threshold question of what constitutes a "vessel."

The first of these cases, *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), considered whether the term "seaman" was limited only to those who aid in a vessel's navigation. In her opinion for the Court, Justice O'Connor acknowledged the relationship between the language of the Jones Act and the LHWCA, stating: "'[M]aster or member of a crew' is a refinement of the term 'seaman' in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key

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[2] *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); and *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548 (1997).

requirement for Jones Act coverage now appears in another statute." *Id.*, at 347. She pointed out that the "aid of navigation" requirement for Jones Act coverage had arisen during the interim between the passage of the LHWCA and *Swanson*, and determined that "[T]he better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones Act, solely in terms of the employee's connection to a vessel in navigation." *Id.*, at 354. She concluded that: "The key to seaman status is employment-related connection to a vessel in navigation. . . [W]e hold that a necessary element of the connection is that a seaman perform the work of a vessel. . . [W]e believe the requirement that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Id.*, at 355 (citations omitted).

The *Wilander* Court also termed the question of who is a seaman as "better characterized as a mixed question of law and fact" and indicated that "the inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel and the employee's precise relationship to it." *Id.*, at 356. Picking up on this issue less than ten months later, the Court examined whether a ship repairman who worked on several "floating platforms" was, as a matter of law, excluded from coverage under the Jones Act by virtue of the LHWCA's express enumeration of "ship repairman" as one of the "harbor-worker[s]" specifically mentioned in the LHCWA's definition of "employee", 33 U.S.C. § 902(3). *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991). Stating that "[A] maritime worker is limited to LHWCA remedies only if no genuine issue of fact exists as to whether the worker was a seaman under the Jones Act", the Court determined that summary judgment was inappropriate where

the ship repairman had raised questions of fact concerning whether the floating platforms were vessels in navigation and whether he had sufficient connection to the platforms to qualify for seaman status.

In *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the Court further clarified *Wilander*'s "employment-related connection to a vessel in navigation" requirement, and concluded that two basic elements were necessary for a maritime worker to qualify as a Jones Act seaman: the worker's duties must contribute to the vessel's function or the accomplishment of its mission, and the worker's connection to a vessel in navigation (or an identifiable group of such vessels) must be substantial in both duration and nature. In reaching this conclusion, the Court reviewed its case law under both the Jones Act and the LHWCA and emphasized that the distinction between "sea-based" Jones Act-covered maritime workers and "land-based" LHWCA workers was status-based, i.e., based on the worker's connection to the vessel (or identifiable group of vessels) and not on whether the injury involved took place on land or at sea.[3]

Thus, to summarize, since *Swanson* this Court has recognized the Congressional intent that the Jones Act and the LHWCA be mutually exclusive and has looked to the LHWCA's exclusion of a master or member of a crew of any vessel to determine seaman status. Under the Court's current

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[3] *Chandris* involved whether a salaried superintendent engineer had a sufficient connection to his employer's fleet of six cruise ships to qualify as a seaman. The final case of the four, *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548 (1997), also addressed the circumstances under which an injured maritime worker could prove "seaman" status by an employment-related connection to a *group* of vessels rather than a single one. This Court determined that there needed to be a requisite degree of common ownership or control of the vessels, and held that, as a matter of law, such was not demonstrated where the only connection between a group of vessels was that each vessel hired some of its employees from the same union hiring hall.

jurisprudence, if a maritime worker's employment-based connection to a vessel (or group of vessels) contributes to the vessel's function or the accomplishment of its mission and is substantial in both duration and nature, that worker is a "seaman" and is to look to the Jones Act for recovery. On the other hand, if the worker is a "person engaged in maritime employment" who does not have a sufficient employment-based connection to a vessel, that worker is not a "seaman" and must look to the LHWCA for his or her remedy.

This summary demonstrates the central importance of a maritime worker's employment-related connection to a "vessel" in resolving the question of whether that worker's remedy lies with the Jones Act or the LHWCA. Yet the Jones Act does not contain the word "vessel," the LHWCA does not define "vessel" in a useful way,[4] and this Court has not offered any definitive guidance on how to determine whether a watercraft is a "vessel" under the Jones Act. It naturally follows that the varying approaches the petitioner has detailed among the lower courts concerning how to determine whether a watercraft is a "vessel" have only contributed confusion to the process of deciding which statute is applicable.

The confusion resulting from the lower courts' conflict on the vessel status issue can be concretely illustrated by focusing on two locations in the voyage of the dredge *Super Scoop*[5] on which petitioner worked—when it started out in

[4] See discussion of the LHWCA's definition of "vessel" at Section B of this brief.

[5] As stated on page two of the petition for a writ of *certiorari*: "To work on the Ted Williams Tunnel project, for example, the dredge was towed from its home base in California, through the Panama Canal, and up the Eastern seaboard to Boston Harbor." Thus, the dredge started in the waters of the Ninth Circuit, and likely passed through the waters of the Eleventh, Fourth, Third, and Second, before beginning to dredge in the waters of the First.

the waters of the Ninth Circuit and when it was in the First Circuit's waters prior to entering Boston Harbor—and applying the relevant circuit precedent concerning vessels. While in the waters of the Ninth Circuit, the dredge, under tow, was likely a vessel, since it was obviously not "permanently moored to the land."[6] And, while we know that the First Circuit determined that the dredge, when working in the Boston Harbor, was not a vessel, it probably *was* a vessel while in transit within the First Circuit's waters. See *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1123 (1st Cir. 1992) (en banc), *cert. denied*, 506 U.S. 827 (1992)("[I]f a barge or other float's 'purpose or primary business is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seaman only when it is in actual navigation *or transit*." (Initial emphasis in original; subsequent emphasis added.)) Thus, the same watercraft—a dredge—may or may not be considered a Jones Act vessel depending on which Circuit it is in, and, even within the same Circuit, its status may change depending on what it is doing.

Without regard to what the appropriate approach to determining vessel status should be, suffice it to say that the demonstrated lack of clarity on which watercraft are vessels does not redound to the benefit of injured maritime workers weighing whether to seek relief under the Jones Act or the LHWCA. As demonstrated next, this lack of clarity is compounded by a series of lower court decisions that seem to hold that "vessel" has differing meanings depending on where in the LHWCA it is used.

[6] As the petitioner points out (*cert.* petition, at 14), it appears that, in the Ninth Circuit, floating structures qualify as vessels unless they meet *all* of the following criteria: they are incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate. *See Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132, 1135 (9th Cir. 2002), quoting *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 660 (9th Cir. 1992).

B. The Lower Courts' Broad Reading of "Vessel" In LHWCA § 905(b) Cases Further Confuses The Line Between The Statutes.

We have described in Section A above how this Court has come to equate the Jones Act term "seaman" with the LHWCA's exclusion from its coverage of "a master or member of a crew of any vessel." This exclusion is found at 33 U.S.C. § 902(3)(G). The term "vessel" is also found at § 905(b) of the LHWCA, which grants an LHWCA-covered employee a third party claim for injury caused by the negligence of a vessel. The interpretation lower courts have given to the term "vessel" in the § 905(b) context demonstrates the need for additional guidance from this Court on the import of its decisions borrowing terms from the LHWCA to define the scope of Jones Act coverage.

§ 905(b) was added to the LHWCA by the 1972 Amendments, which, *inter alia*, replaced an LHWCA-covered injured employee's action for "unseaworthiness" with an action against the vessel for negligence. *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 97 (1994). After the 1972 Amendments, the LHWCA, as summarized by the First Circuit in its second decision in the instant case,

> [I]s a comprehensive worker's compensation system which holds employers liable for compensating covered employees injured in the course of their employment, regardless of fault. 33 U.S.C. § 904. The statutory no-fault compensation payments provided by the LHWCA are considered 'exclusive and in place of all other liability of such employer to the employee.' Id. § 905(a). Therefore, employees covered by the LHWCA are statutorily barred from suing their employers for injuries incurred in the course of their employment. However, while the compensation scheme is the employee's exclusive remedy regarding his employer, the employee is still free to sue the *vessel owner* as a third party if his injury was caused by the negligence of the vessel. (Footnote omitted; emphasis in original.)(App. 5-6).

The 1972 Amendments also added, at § 902(21), a circular definition of the term "vessel." This definition provides that:

> Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

"Obviously this definition does not provide precise guidance as to what is included within the term 'vessel'," *McCarthy v. The Bark Peking*, 716 F.2d 130, 133, (2nd Cir. 1983), and the lower courts that have considered the question of what constitutes a "vessel" for purposes of a § 905(b) action have almost uniformly looked to the broad Federal Rules of Construction definition of vessel contained at 1 U.S.C. § 3: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." See the collection of cases cited in *The Bark Peking*, 716 F.2d at 133-135.

In several cases in which both a Jones Act claim and an alternative § 905(b) LHWCA negligence-of-a-vessel claim have been advanced, the courts have drawn a distinction between a "vessel in navigation" for Jones Act purposes and a "vessel" for LHWCA purposes, see *Stewart v. Dutra Construction Co.*, 343 F.3d 10 (1st Cir. 2003)(App. 1-14); *Kathriner v. UNISEA, Inc.*, 975 F.2d 657 (9th Cir. 1992). In these cases the courts, after determining that the relevant watercraft was not a vessel for Jones Act purposes, applied a different—"significantly more inclusive"—standard for determining whether the watercraft was a vessel for purposes of the LHWCA claim.[7] In each instance, the broad "vessel"

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[7] In its second decision in the instant case, the First Circuit cited its en banc decision in *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603 (1st Cir. 1996) for the proposition that the LHWCA had the broader vessel

definition on which the court relied for § 905(b) purposes was the one found at 1 U.S.C. § 3. See, i.e., *Kathriner*, at 662.

In light of the case law development of the Jones Act described in Section A of this brief, the result in these cases is curious, to say the least. As we have seen, the Jones Act does not contain the word "vessel"; that term has been imported into Jones Act jurisprudence by the equation of the Jones Act term "seaman" with the LHWCA exclusion of "a master or member of a crew of any *vessel*." (Emphasis supplied). The LHWCA nowhere uses the term "vessel in navigation." To the extent this Court used an employment-related connection to a "vessel in navigation" to describe seaman status in its decisions in *Wilander* and *Chandris*, it was merely providing additional content to the LHWCA statutory exclusion of "a master or member of a crew of any vessel."[8] Nonetheless, the net effect of these decisions applying different standards for the term "vessel" in Jones Act and LHWCA cases is that, when used in § 902(3)(G) to exclude "a master or member of the crew of any vessel" from LHWCA coverage, the word "vessel" actually means narrowly "vessel in navigation," but when used in § 905(b) "vessel" has a broader meaning: it means "vessel" as defined in 1 U.S.C. § 3. These decisions—applying different meanings to the same word when it is used in two different places in the same statute—would appear to defy normal rules of statutory construction.

These cases' interpretation that "vessel" as used in § 902(3)(G)'s exclusion of "a master or member of a crew of any vessel" is narrower than "vessel" as defined in 1 U.S.C. § 3 would also seem to conflict with this Court's decision in *Norton v. Warner Co.*, 321 U.S. 565 (1944). In *Norton*, the

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definition and noted that, accordingly, Dutra had conceded that the dredge and the scow in question were vessels for LHWCA purposes. (App. 5).

[8] It is worth noting that, in the passage from *Wilander* quoted at pages 12-13 of this brief, Justice O'Connor uses the terms "vessel in navigation", "vessel", and "ship" interchangeably.

issue was whether a bargeman was a harbor worker or "a master or member of the crew of any vessel"; in the latter event the bargeman would be excluded from LHWCA coverage. This Court held that a barge constituted a "vessel" as the term was used in the exclusion, stating "A barge is a vessel within the meaning of the Act even when it has no power of its own since it is a means of transportation on water" and citing 1 U.S.C. § 3's definition of "vessel" in support of its conclusion. *Id.*, at 571 and fn. 4. While *Norton* was a pure LHWCA case that pre-dated *Swanson*'s recognition of the mutual exclusivity of the Jones Act and the LHWCA and came long before the adoption of the 1972 LHWCA Amendments, there is little reason to question the view expressed in it that "vessel" as used in § 902(3)(G)'s exclusion has the meaning given the word by 1 U.S.C. § 3's definition.

At this point, one is tempted to agree with Judge Toruella: "A vessel is a vessel is a vessel is a vessel." *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1129 (Torruella, J., dissenting) (1st Cir. 1992) (en banc). In any event, the conundrums presented by the lower courts' approaches to determining which watercraft are vessels call out for this Court's guidance.

C. This Court's Intervention Is Necessary To Resolve The Vessel Status Issue.

We have described above how the current test for seaman status is founded on this Court's understanding of Congress' intent that the Jones Act and the LHWCA are "mutually exclusive" and have drawn from that description the natural conclusion that decisions on the appropriate scope of the Jones Act inevitably also delineate the parameters of the LHWCA. However, in the same cases in which it has declared the two statutes' mutual exclusivity, this Court has acknowledged the difficulties in drawing the line constituting

their mutual boundary. See *Chandris Inc. v. Latsis*, 515 U.S. 347, 356 (1995)("[D]rawing the distinction between those maritime workers who should qualify as seamen and those who should not has proved to be a difficult task and the source of much litigation—particularly because 'the myriad circumstances in which men go upon the water confronts courts not with discrete classes of maritime employees, but rather with a spectrum ranging from the blue-water seaman to the land-based longshoreman.'" (Citation omitted.)); *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548, 550(1997) ("The distinction between the two mutually exclusive categories can be difficult to implement, and many cases turn on their specific facts.").

The difficulties described in this Court's decisions are manifested in the lower courts' struggles with the boundaries between the two statutes. The reasons for these struggles are legion, and are not confined solely to the myriad of maritime employment situations referenced in *Chandris*. Also complicating the determinations are supremely practical reasons why injured maritime workers may seek to bring their cases under one statute rather than the other: differing insurance coverage limits in particular cases; the nature of the remedies available under the two laws; a preference for the forum of a Jones Act jury trial rather than an LHWCA administrative proceeding before an administrative law judge; and concern over the standard of care applied in Jones Act negligence cases,[9] to name only a few. Moreover, Congress did not

[9] In light of the holding in *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) that seamen in Jones Act negligence cases are bound to a standard of ordinary prudence in the exercise of care for their own safety, not to a lesser duty of slight care, the Editor of the U.S. Department of Labor, Office of Administrative Law Judges *Judge's Benchbook: Longshore and Harbor Workers Compensation Act* (January 2002), has opined: "Thus, a worker preferring the security of workers compensation will file under the LHWCA coverage rather than gamble on a Jones Act claim where a finding of unreasonableness on the part of the maritime worker could deny him coverage." 1-13.

intend to require an election of remedies between the two statutes, *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 92 at fn. 5 (1991), and, as remedial statutes, both are to be construed liberally. See *Cox v. Roth*, 348 U.S. 207, 210 (1955)(The Jones Act "As welfare legislation . . . is entitled to a liberal construction to accomplish its beneficent purposes.") (quoting *Cosmopolitan Co. v. McAllister*, 337 U.S. 783, 790 (1949)); *Voris v. Eikel*, 346 U.S. 328, 333 (1953)("This Act [the LHWCA] must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results."). Under these circumstances, there should be no wonder that there exists between the two statutes a "zone of uncertainty."[10]

It is not *amicus'* purpose here to overemphasize this zone of uncertainty, or to suggest that it can be eliminated. Rather, we merely acknowledge its existence and point out how the lack of guidance from this Court on the question of what constitutes a "vessel" contributes unnecessary additional indeterminacy. By granting the petition for a writ of *certiorari* and addressing the vessel status question, this Court can bring clarity to a confused, complicated area of the law and limit wasteful, reduplicative litigation. On behalf of the nation's maritime workforce, we urge this Court to take advantage of the opportunity presented by petitioner.

[10] The term "zone of uncertainty" was used by the Fifth Circuit pre-*Wilander*. See *McDermott v. Boudreaux*, 679 F.2d 452, 459 (5th Cir. 1982); *Simms v. Valley Line Company*, 709 F.2d 409, 412 (5th Cir. 1983). Despite the substantial clarification obtained from *Wilander* and the other cases discussed in Section A of this brief, the term continues to describe accurately the situation along the border between the Jones Act and the LHWCA.

CONCLUSION

This Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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No. 03-814

In The
Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE UNIVERSITY OF SAN FRANCISCO MARITIME LAW JOURNAL IN SUPPORT OF PETITION FOR *CERTIORARI*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR *CERTIORARI*

The University of San Francisco Maritime Law Journal ("USFMLJ") herewith respectfully moves this Court, pursuant to Rules 21.2(b) and 37.2, for leave to file an *amicus curiae* brief in support of the Petition for *Certiorari* filed by Willard Stewart.

The USFMLJ is a non-profit, student-run law journal affiliated with the University of San Francisco School of Law. Its primary mission is to publish a biannual legal periodical to which academics and attorneys can turn for commentary on the latest developments in maritime law. It reaches subscribers both here and abroad and publishes articles submitted by students, professors and practitioners from all across the country. As part of that mission, it oversees several aspects of the maritime law program offered by the University of San Francisco School of Law, administers an internship program whereby law students receive academic credit for performing clinical work in maritime law firms, publishes the proceedings of the Pacific Admiralty Seminar, and sponsors the Judge John R. Brown National Admiralty Moot Court Competition whenever it convenes in the San Francisco Bay Area.

The USFMLJ has published several notes and comments on issues arising under the Jones Act, 46 U.S.C.A. § 688, and believes that the Petition for *Certiorari* filed by Willard Stewart frames an issue whose resolution is vital to the uniform interpretation and efficient administration of that statute. It is for these reasons that movant

respectfully request leave to file the attached *amicus curiae* brief in support of that Petition.

January 7, 2004

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INTEREST OF *AMICUS CURIAE*

This brief is being filed, with the consent of Petitioner Willard Stewart, on behalf of the University of San Francisco Maritime Law Journal ("USFMLJ"). The USFMLJ is a non-profit, student-run law journal affiliated with the University of San Francisco School of Law.[1] It publishes a biannual legal periodical which comments exclusively on maritime law. That periodical reaches subscribers both here and abroad and publishes articles submitted by students, professors and practitioners from all across the country. The USFMLJ has published several notes and comments about the Jones Act, 46 U.S.C.A. § 688, and believes that this case presents an issue whose resolution is vital to the uniform interpretation and efficient administration of that statute.

SUMMARY OF ARGUMENT

This Court should grant Willard Stewart's petition for *certiorari* to resolve a stubborn conflict over the meaning of the term "vessel." That conflict not only divides the lower federal courts, it has spawned ancillary rifts among the derivative state court decisions.

State courts exercise concurrent jurisdiction over Jones Act cases under the so-called "reverse *Erie* doctrine,"

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[1] This brief was prepared on behalf of the USFMLJ by its counsel. It was not authored, in whole or in part, by counsel for any party. No person or entity other than the USFMLJ, or its counsel, made a monetary contribution to the preparation or submission of the brief. Though the USFMLJ is affiliated with the University of San Francisco School of Law, this brief does not necessarily reflect the views of the University of San Francisco.

whereby all substantive issues are governed by federal maritime law in the interests of uniformity. *Hutchins v. Juneau Tanker Corp.*, 28 Cal.App.4th 493, 499, 33 Cal.Rptr.2d 542 (1994). Here in California, the State Court of Appeal has traditionally followed the maritime decisions of the Ninth Circuit so that "the same rules will be applied in federal and state courts in California." *Keith v. S.S. Goldstone*, 81 Cal.App.3d 699, 704 (1978). But that State's Second District Court of Appeal recently deviated from this tradition by adopting the First Circuit's holding in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1326 (1st Cir. 1992) (*en banc*). *See, Spears v. Kajima Eng. & Const. Co.*, 101 Cal.App.4th 466, 475, 124 Cal.Rptr.2d 97 (2002). State and federal courts in California now apply different rules for identifying the water craft that qualify as vessels under the Jones Act. *Compare Spears with Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132, 1136 n.2 (9th Cir. 2002). Worse, they are entering inconsistent judgments in cases which are materially indistinguishable. *Compare e.g., Gipson v. Kajima Eng. and Const., Inc.*, 972 F.Supp. 537, 542-43 (C.D.Cal. 1997) (unpowered crane barge deployed to repair bridge could not be vessel) *with Gault v. Modern Continental/Roadway Const. Co., Inc. J.V.*, 100 Cal.App.4th 991, 1005, 123 Cal.Rptr.2d 85 (2002) (unpowered crane barge deployed to repair bridge could be vessel). "With this surfeit of doctrine to choose from, it is not surprising that there are many close cases on vessel status – approaching the point of arbitrariness." Thomas J. Schoenbaum, *Admiralty and Maritime Law* (3rd ed. 2001) Vol.1, § 6-9, p. 284.

This case presents an opportunity to ameliorate those arbitrary results with a much needed uniform rule. It would also allow this Court to finish the work it began during the 1990's when it took the Jones Act in hand and

ruled that: "The inquiry into seaman status is fact specific; it will depend on the nature of the vessel and the employee's precise relationship to it." *McDermott Int'l. v. Wilander*, 498 U.S. 337, 356 (1991). The four opinions this Court handed down to elaborate that "precise relationship" not only clarified the distinction Congress drew between "sea-based workers" and "land-based workers," *id.* at 353-54, they spelled out the "essential elements" of seaman status. *Chandris, Inc. v. Latsis,* 515 U.S. 347, 368 (1995); *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997); *see also, Southwest Marine, Inc. v. Gizoni* ("*Gizoni I*"), 502 U.S. 81 (1991).

But those four opinions did not get an opportunity to address the question of vessel status. To quote the decision below, "they have left the lower courts to fret, largely unguided, over what is or is not a vessel in navigation." *Stewart v. Dutra Const. Co., Inc.* ("*Stewart I*"), 230 F.3d 461, 466 (1st Cir. 2000), *Appendix B* at App. 21. All this fretting has split the circuits, estranged the Jones Act from the Longshore and Harbor Workers Compensation Act ("LHWCA"),[2] and perpetuated the notorious "zone of uncertainty" which lurks at the borderline between those two statutes. The Petition presents an opportunity to bind up the conflicts, bring the Jones Act back in step with the LHWCA, and alleviate some of the uncertainty still besetting the maritime workers "who must choose whether and by what means they will pursue remedies that in substantive theory are perfectly mutually exclusive (the Compensation Act, which for present purposes applies to all but seamen, and the Jones Act, which applies only to

[2] 33 U.S.C. §§ 901 *et seq.*

seamen), but which seem in practice to frequently overlap each other's borders." *Simms v. Valley Lines, Inc.*, 709 F.2d 409, 411 (5th Cir. 1983).

ARGUMENT

I. The Court should accept *certiorari* to bind up the conflicting definitions which the lower courts have applied to the term "vessel" with a much needed uniform rule

The Jones Act permits "[a]ny seaman injured in the course of his employment" to sue his employer for negligence. Because Congress did not define who is or is not a "seaman," the courts have had to make that determination for themselves. *Id.* at 343-51. Over the years, no fewer than ten[3] of the eleven U.S. Circuit Courts have weighed in on the question. Forced to make an independent determination of the conflicting federal principles, state courts have added their constructions to this already crowded corner of the law.[4] The resulting

[3] *See, DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992); *Latsis v. Chandris, Inc.*, 20 F.3d 45 (2nd Cir. 1994), *aff'd*, 515 U.S. 347 (1995); *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247 (3rd Cir. 1994); *Stephenson v. McLean Const. Co.*, 863 F.2d 340 (4th Cir. 1988); *Holland v. Allied Structural Steel Co., Inc.*, 539 F.2d 476 (5th Cir. 1976), *cert. denied*, 429 U.S. 1105 (1977); *Hatch v. Durocher Dock & Dredge, Inc.*, 56 F.3d 545 (6th Cir. 1994); *Johnson v. John F. Beasley Const. Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984); *Johnson v. Continental Grain Co.*, 58 F.3d 1232 (8th Cir. 1995); *Southwest Marine, Inc. v. Gizoni ("Gizoni II")*, 56 F.3d 1139, 1142 (9th Cir. 1995); *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir. 1990).

[4] *See, e.g.*; *Soucie v. Trautwein Bros.*, 275 Cal.App.2d 20 (1969) (pile driver held seaman); *O'Bryan v. Folk Const. Co.*, 594 So.2d 900 (La.App. 1991) (suction dredge hand held seaman); *Allen v. Mobile Interstate Piledrivers*, 475 So.2d 427 (Ala.Sp.Ct. 1985) (pile driver held seaman);

(Continued on following page)

jurisprudence became very tangled indeed. As this Court famously observed: "'We have made a labyrinth and got lost in it.'" *Wilander*, 498 U.S. at 353 *quoting Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1060 (7th Cir. 1984).

In order to light the way out, the Supreme Court accepted *certiorari* in four Jones Act cases during the 1990's. The ensuing opinions "jettison[ed]" the traditional requirement that a seaman be aboard "primarily to aid in navigation," *Wilander*, 498 at 353, emphasized that it is the plaintiff's connection to a vessel and not his or her particular job that is determinative, *Gizoni I*, 502 U.S. at 88, rejected a "snapshot" or "moment of the injury" approach in favor of a scrolling analysis which assesses the "total circumstances" of the plaintiff's overall employment, *Chandris*, 515 U.S. at 363, "eschew[ed] the temptation to create detailed tests," *id.* at 369, and ruled that:

> '[T]he essential requirements for seaman status are twofold. First . . . an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission. . . .
>
> Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.' *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997) *quoting Chandris, supra*, 515 U.S. at 368.

Maloney v. State, 141 N.Y.S.2d 207 (N.Y. Ct. Cl. 1955), *aff'd*, 154 N.Y.S.2d 132, 2 A.D.2d 872, *aff'd*, 165 N.Y.S.2d 465, 144 N.E.2d 364, 3 N.Y.2d 356 (1956) (derrick barge hand held seaman). Each of these holdings conflicts with the decision below.

But those clarifications have left one last twist in the labyrinth; they did not address the standard for Jones Act vessel status. *Stewart I*, 230 F.3d at 466, *Appendix B* at App. 21.

A. The statutory rule of construction

Though the relevant portions of the Jones Act neither use nor define the term "vessel," many other federal statutes do.[5] Those statutes all echo the definition set forth in the federal Rules of Construction: "The term 'vessel' includes every description of water craft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water." 1 U.S.C. § 3 (emphasis added). This Court cited that Rule in *Norton v. Warner Co.*, 321 U.S. 565, 571 n.4 (1944), when it held that: "A barge is a vessel within the meaning of the [Jones] Act even when it has no motive power of its own, since it is a means of

[5] Those statutes include the Shipping Act (46 U.S.C. § 2101(45)), the Merchant Marine Act of 1920 (46 U.S.C. § 801), the International Navigation Rules Act of 1980 (33 U.S.C. § 1601(1)), the Inland Navigation Rules Act of 1980 (33 U.S.C. § 2003(a)), the Public Health Service Act (42 U.S.C. § 201(i)), the Excise Taxes Act (26 U.S.C. § 5688(c)), the Whaling Convention Act (16 U.S.C. § 916(e)), the Neutrality Act of 1939 (22 U.S.C. § 456(c)), the Navigation Act of 1974 (33 U.S.C. § 1502(19)), the Oil Pollution Act of 1990 (33 U.S.C. § 2701(37)), the Sentencing Reform Act (18 U.S.C. § 3667), the Communications Act of 1934 (47 U.S.C. § 153(w)(1)), the Tariff Act of 1930 (19 U.S.C. § 1401(a)), the Interstate Act against Importation and Exportation of Motor Vehicles, Vessels and Aircraft (18 U.S.C. § 533(c)(3)), the Comprehensive Environmental Response Compensation and Liability Act of 1980 (42 U.S.C. § 9601(28)), the Anti-Gambling Act (19 U.S.C. § 1081), the Federal Ship Mortgage Insurance Act (46 U.S.C. § 1271(b)), the Contraband Seizure Act (49 U.S.C. § 787(a)), the Antifouling Paint Control Act of 1988 (33 U.S.C. § 2402(11)), the Interstate Commerce Act (49 U.S.C. § 10102(28)), the Submarine Cable Act (47 U.S.C. § 30) and the Federal Water Pollution Control Act (33 U.S.C. § 1321(a)(3)).

transportation over water." *Id.* at 571. *See also, Ellis v. Eastern Dredging Co.*, 206 U.S. 246, 259 (1906) (holding dredge "vessel" under 1 U.S.C. § 3).

At one time, the statutory vessel definition was also followed by the Fifth Circuit, *Burks v. American River Transp. Co.*, 679 F.2d 69, 75 (5th Cir. 1982), and perhaps even by the First. *See, Bennett v. Perini Corp.*, 510 F.2d 114, 116 (1st Cir. 1975) ("To be a vessel, the purpose and business must to some reasonable degree be the transportation of passengers, cargo, or equipment from place to place across navigable waters."). This is hardly surprising. "Maritime tort law is dominated by statute," and those statutes must be uniformly applied. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990). *Id.* But 1 U.S.C. § 3 no longer commands such application.

B. The "floating work platform doctrine" and the narrow vessel standards of the Second, Fifth and Eleventh Circuits

While Judge Wisdom was still on the bench, the Fifth Circuit stood by the statutory definition, *see, Burks, supra,* and accorded Jones Act vessel status to a whole armada of "special purpose structures not usually employed as a means of transportation." *Offshore Co. v. Robison,* 275 F.2d 769, 779-80 (5th Cir. 1959); *see also, Blanchard v. Engine & Gas Compressor Services, Inc.,* 575 F.2d 1140, 1142 (5th Cir. 1978); *Hicks v. Ocean Drilling and Exploration Co.,* 512 F.2d 817 (5th Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976). But in 1984, that Circuit launched the "floating work platform doctrine." *Bernard v. Binnings Constr. Co.,* 741 F.2d 824 (5th Cir. 1984).

Based on three "non-requisite criteria" and nine free-floating "factors," the floating work platform doctrine

denies vessel status to any water craft that is not used *primarily* for transportation. *Ellender v. Kiva Constr. & Eng'g, Inc.*, 909 F.2d 803, 806 (5th Cir. 1990). The "non-requisite criteria" inquire whether the craft at issue was (a) constructed and used primarily as a work platform rather than for transporting people or things, (b) moored or otherwise secured at the time of the accident, and (c) capable of anything other than a "merely incidental" transportation function; the free-floating factors ask if it had (1) navigational aids, (2) a raked bow, (3) lifeboats or other life-saving equipment, (4) bilge pumps, (5) crew quarters, (6) Coast Guard registration, (7) the ability to float, (8) the ability to move, and (9) a recent history of movement? *See, Bernard*, 741 F.2d at 831-832.

Commentators have criticized this approach as "prolix," "extremely flabby" and given to arbitrary results. David W. Robertson, *The Law of Seaman Status Clarified*, 23 J.Mar.&Com. 1, 14-15 (1992).

> For example, in *Sharp v. Johnson Bros. Corp.*, [917 F.2d 885 (5th Cir. 1990)], the court reversed a summary judgment holding that two spud barges used as pile driving barges and two ordinary flat barges used as work platforms were not vessels; however in *Ellender v. Kiva Construction & Engineering, Inc., supra*, the court upheld summary judgment holding that the pile driving barges in question were not vessels, but only construction platforms. The distinction between these and many of the other vessel cases is without theoretical significance either based upon the objective characteristics of the structures themselves or the relative perils faced by the workers in question. This area of the law cries out for fundamental reform.

Schoenbaum, *supra* § 6-9, p. 284. The work platform doctrine has nonetheless been adopted by the Eleventh Circuit, *Hurst v. Pilings & Structures,* 896 F.2d 504 (11th Cir. 1990), and, in a slightly modified form, by the Second Circuit. *Tonnensen v. Yonkers Contracting Co.,* 82 F.3d 30, 36 (2nd Cir. 1996).

C. The broader vessel standards of the Third, Fourth, Seventh and Ninth Circuits

In contrast to the work platform doctrine, the Ninth Circuit holds "that unusual-looking craft whose purpose is not the transportation of persons or things can be considered vessels under the Jones Act." *Southwest Marine, Inc. v. Gizoni* ("*Gizoni II*"), 56 F.3d 1139, 1142 (9th Cir. 1995); *see also, Estate of Wenzel v. Seaward Marine, Inc.,* 709 F.2d 1326, 1328 (9th Cir. 1983). While this holding conflicts with the standards employed by the First, Second, Fifth, Sixth and Eleventh Circuits, it does not sit so far out on the limb as Petitioner suggests. *Petition* at 14-17.[6]

Because *Kathriner v. UNISEA, Inc.*, 975 F.2d 657 (9th Cir. 1992), ruled that "floating structures are not classified as vessels in navigation if they are incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate[,]" *id.* at 660, the Petition assumes "every floating structure qualifies as a Jones Act vessel" in the Ninth Circuit "unless it meets all four

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[6] We disagree with Petitioner's understanding of the Ninth Circuit "test," but endorse his prayer for *certiorari*. The various interpretations to which the lower court decisions are susceptible is further evidence of the need for a uniform rule.

Kathriner criteria." *Petition* at 15. But the criteria listed in *Kathriner* were offered as a case specific rationale, not a general rule. "There is no generalized test in the Ninth Circuit for determining whether a craft is a vessel in navigation[.]" *Martinez*, 303 F.3d at 1135. Its decisions are nonetheless consistent with 1 U.S.C. § 3.

The Ninth Circuit only denies vessel status to watercraft that have no transportation function of any kind. *Kathriner*, 975 F.2d at 660-61. It entrusts a jury with the status of any contrivance capable of being used as a means of transportation over water. *Martinez*, 303 F.3d at 1136-37 (fish processing barge); *Gizoni II*, 56 F.3d at 1142 (shipyard work platform); *Estate of Wenzel*, 709 F.2d at 1327-28 (submerged cleaning and maintenance platform). Since they necessarily transport their crew and equipment over water, dredges like the *Super Scoop* have always been treated as vessels in the Ninth Circuit. *Ramos v. Universal Dredging Corp.*, 547 F.Supp. 661, 663 (D.Ha. 1982); *see also, City of Los Angeles v. United Dredging Co.*, 14 F.2d 364 (9th Cir. 1926) (citing 1 U.S.C. § 3).

This ecumenical approach is also followed by the Seventh Circuit, *Johnson*, 742 F.2d at 1063 ("Any floating structure, including those designed for special purposes, is a 'vessel' . . . so long as the structure at some time serves as a means of transportation on water."), the Fourth Circuit, *Hill v. Diamond*, 311 F.2d 789, 791 (4th Cir. 1962) ("It is well established that many special purpose craft, such as dredges, floating derricks and barges equipped for special purposes or operations are vessels within the meaning of the Jones Act[.]"), and the Third Circuit. *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 37 (3rd Cir. 1975) (upholding Jones Act vessel status for a dumb barge because "the Supreme Court has extended

that remedy so as to permit claims brought for injuries incurred in the construction of a "Texas Tower," *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) and an off-shore oil rig, *Gianfala v. Texas Co.*, 350 U.S. 879 (1955)."). *See also, Reeves v. Mobile Dredging & Pumping Co., supra* (holding dredge was vessel for Jones Act purposes).

D. The "actual transit" test and the restrictive vessel standards of the First and Sixth Circuits

Building on the work platform doctrine,[7] misinterpreting the phrase "in navigation,"[8] and misreading the transcript in *Gizoni I*,[9] the First Circuit has ruled that, "if

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[7] *DiGiovanni* relies heavily on *dictum* suggesting " 'that a structure whose purpose is *not* navigation or commerce upon navigable waters may nonetheless satisfy the Jones Act's vessel requirements if, at the time of the worker's injury, the structure was actually in navigation.' " 959 F.2d at 1123 *quoting Bernard*, 741 F.2d 829 (original emphasis).

[8] The phrase "in navigation" is "used in its broad sense and is not confined strictly to the actual navigating or movement of the vessel." *Johnson*, 742 F.2d at 1063; *see generally*, Edwin J. Bull, *Seaman Status Revisited: A Practical Guide to Status Determination*, 6 U.S.F. Mar. L.J. 547, 582-84 (1994). The distinction is between a "dead ship" and an operational one. *See, Chandris*, 515 U.S. at 372-76. While a ship in mothballs is "out of navigation" even when it's being towed across the Atlantic, *see, West v. United States*, 361 U.S. 118, 123-24 (1959), and an unfinished ship has not yet "entered navigation" even though it has already voyaged from New Orleans to Tacoma, *see, McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 568 (9th Cir. 1992), an operating vessel with a crew aboard remains "in navigation" even when it is sitting in dry dock. *See, Chandris*, 515 U.S. 347; *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1001-02 (5th Cir. 1973).

[9] *DiGiovanni* distinguishes *Gizoni I* by suggesting the plaintiff in that case was injured aboard a platform which was "engaged in

(Continued on following page)

a barge, or other float's 'purpose or primary business is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit." *DiGiovanni,* 959 F.2d at 1123 (original emphasis). This rule is even more restrictive than the work platform doctrine, 959 F.2d at 1128 (Torruella, J., dissenting), and has been adopted by both the Sixth Circuit, *Hatch v. Durocher Dock & Dredge, Inc.,* 33 F.3d 545, 547-48 (6th Cir. 1994), and the California Court of Appeal. *Spears,* 101 Cal.App.4th at 475. It is also the basis for the decision below. *Stewart I,* 230 F.3d at 467, *Appendix B,* p. 22.

E. The vessel standards of the First, Second, Fifth, Sixth and Eleventh Circuits cannot be reconciled with the decisions of this Court

1. The floating work platform doctrine is in tension with this Court's decisions in *Senko, Gizoni I* and *Grubart*

The work platform doctrine cannot be reconciled with this Court's opinions in *Gizoni I, supra, Senko v. LaCrosse Dredging Corp.,* 352 U.S. 370, 371 (1957), or *Grubart v. Great Lakes Dredge & Dock,* 513 U.S. 527 (1995). *Senko* upheld the Jones Act verdict of a "handyman" who was injured on a levee in Illinois while serving a dredge "which, though afloat, served as a stationary earth removing machine." 352 U.S. at 371. *Gizoni I* reversed a defense

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transportation" at the time and place of his injury. 959 F.2d at 1124. In fact, that platform was then and there "secured to the end of a floating dry dock[.]" *Gizoni II,* 56 F.3d at 1140 n.1.

summary judgment and remanded the putative Jones Act claims of a shipyard hand who spent most of his time working aboard a fleet of "floating platforms."

> These platforms by themselves have no power, means of steering, navigation lights, navigation aids, or living facilities. They are moved about by tugboats, which position the platforms alongside vessels under repair at berths or in drydock at Southwest Marine's shipyard or at the nearby naval station. The platforms are used to move equipment, materials, supplies, and vessel components around the shipyard and onto and off of the vessels under repair. Once in place, the plaftorms support ship repairmen engaged in their work.

502 U.S. at 83-84. While the craft in *Senko* and *Gizoni I* ferried workers and equipment as an incident of their overall missions, there is nothing to suggest that they were used primarily for transportation. This Court has never made that a prerequisite of vessel status.

In *Grubart*, for example, it was obliged to consider the vessel status of a derrick barge deployed "to replace wooden pilings clustered around the piers of several bridges spanning the Chicago River." 513. U.S. at 530. That case concerned the notorious pile driving mishap that flooded a utility tunnel beneath the Chicago River and blacked-out several adjoining skyscrapers. This Court accepted *certiorari* to decide whether admiralty enjoyed jurisdiction over such a calamity under the Vessel Owner's Limitation Act. 46 U.S.C. §§ 181 *et seq.* One of the threshold issues was whether the accident barge was a vessel in navigation. "Even though the barge was fastened to the river bottom and was in use as a work platform at the times in question," the Court allowed as how no one could

"seriously dispute the conclusion of each court below that the Great Lakes barge is, for admiralty tort purposes, a 'vessel.'" *Id.* at 355.

2. The actual transit test is in tension with this Court's decisions in *Wilander*, *Chandris* and *Harbor Tug*

The actual transit test employed by *DiGiovanni* and the decisions below can't be reconciled with the opinions of this Court. *Senko,* once again, upheld seaman status for an Illinois dredge hand injured in the service of "a stationary earth removing machine." 352 U.S. at 371. There is nothing in that opinion to imply this floating machine wasn't stationary at the time of the injury. More importantly, the actual transit test not only resuscitates the "aid to navigation" requirement this Court jettisoned in *Wilander,* 498 U.S. at 353, it is inconsistent with *Chandris* and *Harbor Tug*. Under those opinions, a plaintiff's Jones Act status must be determined, not from a fleeting "snapshot" of his duties at the moment of injury, but "'in the context of his entire employment' with his current employer." *Chandris*, 515 U.S. at 366; *Harbor Tug*, 520 U.S. at 558 (1997). The idea is "to avoid engrafting upon the statutory classification of a 'seaman' a judicial gloss so protean, elusive, or arbitrary as to permit a worker to walk into and out of coverage in the course of his regular duties." *Chandris*, 515 U.S. at 363. The actual transit test coats the standard for vessel status with just such a gloss. The California Court of Appeal's decision in *Gault* provides the perfect case in point.

Though that decision borrowed indiscriminately from the conflicting Jones Act jurisprudence of three different circuits,[10] it took special pains to distinguish *DiGiovanni. Gault* allowed a jury to determine the seaman status of a pile driver employed aboard a "flexi-float barge" deployed to build a bridge over a flood control channel. 100 Cal.App.4th at 996. The barge had no independent means of propulsion and was lying at anchor at the time of the accident. *Id.* It consisted of three 10- by- 60-foot sections that could be reconfigured in various ways. *Id.* The plaintiff was injured while reconfiguring the barge when the section on which he was standing capsized after it had been separated from the others. *Id.* The State Court of Appeal found a triable issue of material fact as to whether the capsized section had been "in transit" at the moment of the accident. *Id.* at 1002. We submit that, after *Chandris,* a special purpose craft cannot oscillate in and out of vessel status (or carry its crew in and out of Jones Act coverage) at the uncoupling or re-coupling of a flexifloat.

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[10] At various points in its opinion, the State Court of Appeal cites authority from the First Circuit, *DiGiovanni, supra,* the Fifth Circuit, *In re Endeavor Marine, Inc.*, 234 F.3d 287 (5th Cir. 2000), and the Ninth Circuit. *Heise v. Fishing Co. v. Alaska, Inc.*, 79 F.3d 903 (9th Cir. 1996); *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289 (9th Cir. 1997); *Delange v. Dutra Const. Co., Inc.*, 183 F.3d 916 (9th Cir. 1999). That authority is in conflict. Unlike *DiGiovanni, Endeavor Marine* and *Delange* allowed Jones Act claims for workers who were injured aboard anchored crane barges.

F. The conflict between the lower courts shows no sign of abating

Although the Fifth Circuit has recently queried whether the work platform doctrine should sail on in the wake of this Court's decision in *Gizoni I,* it has not expressly abandoned that doctrine. *See*, *Manuel v. P.A.W. Drilling Well Service, Inc.,* 135 F.3d 344, 347-50 (5th Cir. 1998).[11] But the Ninth Circuit has renounced it. *Martinez,* 303 F.3d at 1136-37. That Circuit has also rejected *DiGiovanni. Id.* at 1136 n.2. So has the Second Circuit. *Tonnensen,* 82 F.3d at 34. But the First Circuit refuses to abandon ship. 230 F.3d at 467, *Appendix B* at 23. Until these conflicts have been resolved, the construction of the Jones Act will continue to be uncertain, and the lower courts will have to re-examine, narrow or distinguish all the conflicting authority on point over and over again.

[11] The plaintiff in *Manuel* was an oil field hand injured aboard a spud barge anchored over an abandoned well head. The trial court had relied on the work platform doctrine to dismiss his Jones Act claims on the ground that his spud barge was not a vessel. The Fifth Circuit reversed and questioned the continued vitality of the work platform doctrine after noting that "many of our work platform cases were decided before the Supreme Court's decision in *Southwest Marine, Inc. v. Gizoni*, where the Court concluded that genuine issues of material fact existed 'regarding whether the floating platforms [upon which plaintiff Gizoni had worked] were vessels in navigation.'" *Id.* at 350 n.8 (*quoting Gizoni I*, 502 U.S. at 92). As the decision observed, "special purpose craft such as submersible drilling barges, jack-up rigs, and spud barges remain stationary while performing work, yet retain their vessel status." *Id.* at 351.

II. This Court should also accept *certiorari* to bring the interpretation of the Jones Act back in step with the LHWCA

Although the relevant provisions of the Jones Act do not use the term "vessel," the LHWCA does. That statute specifically excludes "a master or a member of a crew of any vessel" from its protection. 33 U.S.C. § 902(3)(G). Since that phrase was designed to bar Jones Act beneficiaries from LHWCA benefits, it is not only synonymous with the term "seaman," it codifies "the key requirement for Jones Act coverage[.]" *Wilander,* 498 U.S. at 347; *Chandris,* 520 U.S. at 553. One might therefore assume that the term "vessel" has the same meaning under the LHWCA as it does under the Jones Act. But according to the lower courts: "The LHWCA definition of 'vessel' is significantly more inclusive than that under the Jones Act." *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 607 (1st Cir. 1996). Most maritime workers therefore append an alternative fourth cause of action for vessel owner negligence[12] to the "trilogy of heightened legal protections" traditionally pled under the Jones Act.[13] *See e.g., Kathriner,* 975 F.3d 662-63; *DiGiovanni v. Traylor Bros.* ("*DiGiovanni II*"), 97 F.3d 624 (1st Cir. 1996). Quite apart

[12] Though LHWCA compensation is ordinarily an injured waterfront worker's exclusive remedy against his or her employer, 33 U.S.C. § 905(a), that rule does not apply to a "dual-capacity" defendant. *See generally,* 1 Schoenbaum, *supra*, § 7-10, pp. 449-50. A dual capacity defendant can be liable for both workers' compensation *and* vessel owner negligence. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 530-31 (1983); 1 Schoenbaum, *supra,* p. 450.

[13] The Jones Act carries with it the rights to sue for negligence, unseaworthiness and maintenance, cure and found. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995).

from the inefficiency and expense these alternative claims beget, they beg the question: Why should courts employ different standards for determining what is or is not a vessel under the Jones Act and the LHWCA?[14]

Most lower courts employ the statutory definition in 1 U.S.C. § 3 to determine whether a floating structure is "vessel" under the LHWCA. *McCarthy v. The Bark Peking,* 716 F.2d 130, 133-34 (2nd Cir. 1983); *Kathriner,* 975 F.2d at 662; *Morehead, supra*; *DiGiovanni v. Traylor Bros.*, 830 F.Supp. 106, 108-109 (D.R.I. 1993): Since this Court has used 1 U.S.C. § 3 to uphold vessel status under the Jones Act, *Norton,* 321 U.S. at 571 n.4, it is difficult to understand why that Rule should not be universally applied.

III. The Court should finally accept *certiorari* to alleviate the uncertainties still besetting maritime workers employed at the borderline between the Jones Act and the LHWCA

Courts and commentators have long recognized "the difficulties faced by injured maritime workers arguably both seamen and harbor workers who must choose whether and by what means they will pursue remedies that in substantive theory are perfectly mutually exclusive (the Compensation Act, which for present purposes applies to all *but* seamen, and the Jones Act, which applies *only* to seamen), but which seem in practice to frequently overlap

[14] The first circuit explains this disparity by noting that a Jones Act seaman "'must have a substantial employment-related connection to a vessel *in navigation.*'" *Morehead,* 97 F.3d at 607 n.3 *quoting Chandris,* 515 U.S. at 368 (emphasis original). But this explanation misconstrues the phrase "in navigation." *See* n.8 *supra.*

each other's borders." *Simms v. Valley Lines, Inc.*, 709 F.2d 409, 411 (5th Cir. 1983); *see also, Gizoni I,* 502 U.S. at 91; *Figueroa v. Campbell Industries,* 45 F.3d 311, 315 (9th Cir. 1995); *Boatel, Inc. v. Delamore,* 379 F.2d 850, 854 (5th Cir. 1967). "Thus, despite our continued insistence that a Jones Act 'seaman' and a 'crew member' excluded from the Longshoremen's Act are one and the same (in other words that the statutes are mutually exclusive), we recognize that in a practical sense, a 'zone of uncertainty' inevitably connects the two Acts." *Simms, supra* (citations omitted).

This Court eliminated much of that uncertainty when it clarified the relationship which the Jones Act and the LHWCA require between a vessel and a member of a crew. *Chandris, supra,* 515 U.S. at 368; *Wilander*, 498 U.S. at 356. The conflicting standards for vessel status are the only thing still obscuring that relationship. Most of the inconsistent results which continue to plague this corner of the law are attributable to that conflict. *Compare e.g., Bennett,* 510 F.2d at 116 (barge-based bridge builder could be seaman because his barge was capable of transporting "passengers, cargo or equipment across navigable waters"); *DiGiovanni,* 959 F.2d at 1121 (barge-based bridge builder could not be seaman because his barge was not "in transit at moment of injury"); *Tonnensen,* 82 F.3d at 36 (barge-based bridge builder could be seaman because there was "some evidence" that his barge had transportation function); *Sharp,* 917 F.2d at 888-89 (barge-based bridge builder could be seaman because transportation function of his barge was "more than incidental"); *Gipson,* 972 F.Supp. 537, 542-43 (barge-based bridge builder could not be seaman because his barge was not used "primarily for navigation and commerce"); *Becker v. Dillingham Construction Pacific, Ltd.,* 2001 AMC 1376, 1386-88 (D.C.Haw.

2001) (barge-based bridge builder could be seaman because his barges were capable of transportation); *Gault*, 100 Cal.App.4th 991, 1005 (flexifloat-based bridge builder could be seaman because float on which he was standing at moment of injury was uncoupled). The Court could alleviate that uncertainty, and make it easier for employers to predict which of their workers will be covered by the Jones Act and which will be covered by the LHWCA, *see, Harbor Tug*, 520 U.S. at 558, if it accepts *certiorari* in this case.

CONCLUSION

WHEREFORE the USFMLJ respectfully submits that Willard Stewart's petition for a writ of *certiorari* should be granted.

January 7, 2004 Respectfully submitted,

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(10)

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In The Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

JOINT APPENDIX

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CIVIL DOCKET FOR CASE #: 1:95-cv-11046-RCL

Filing Date	#	Docket Text
05/19/1995	1	Complaint filed. Case assigned to Judge: Lindsay. Receipt #: none Amount: $ waived. (fmr) (Entered: 05/23/1995)
06/09/1995	3	Answer by Dutra Construction to complaint; jury demand, filed c/s. (fmr) (Entered: 06/09/1995)
09/10/1996	14	Motion by Willard T. Stewart for leave to file amended complaint, filed. (sat) (Entered: 09/11/1996)
		* * *
09/12/1996	17	Amended complaint by Willard T. Stewart filed. (Answer due 9/22/96 for Dutra Construction). Amended complaint amends [1-1] complaint. (sat) (Entered: 09/12/1996)
09/16/1996	18	Motion by Dutra Construction for summary judgment, filed; c/s. (sat) (Entered: 09/16/1996)
09/16/1996	19	Memorandum by Dutra Construction in support of [18-1] motion for summary judgment, filed; c/s. (sat) (Entered: 09/16/1996)
		* * *
10/02/1996	22	Response by Willard T. Stewart in opposition to [18-1] motion for summary judgment, filed; c/s. (sat) (Entered: 10/03/1996)

10/18/1996 23 Supplemental Motion by Dutra Construction for summary judgment, filed c/s. (lmh) (Entered: 10/18/1996)

10/18/1996 24 Supplemental Memorandum by Dutra Construction in support of [23-1] motion for summary judgment, filed c/s. (lmh) (Entered: 10/18/1996)

* * *

12/03/1996 28 Answer by Dutra Construction to amended complaint, filed.; jury demand; c/s. (sat) (Entered: 12/03/1996)

* * *

02/06/1997 30 Suggestion of bankruptcy by Dutra Construction, filed; c/s. (sat) (Entered: 02/06/1997)

* * *

02/10/1997 32 Judge Reginald C. Lindsay. Procedural Order entered. In order to avoid the necessity for counsel to appear at periodic status conference, the Court enters the following Administrative Order: The above-captioned case is dismissed without prejudice to either party moving to restore it to the docket, upon final determination of bankruptcy proceedings, by filing an appropriate motion. Entered cc/cl (lau) (Entered: 02/10/1997)

* * *

06/17/1998 36 Judge Reginald C. Lindsay. Clerk's Notes: re: status conference; plaintiff moves to restore this case to the docket-motion allowed. Case to be reopened. Counsel report that there is a motion for summary judgment pending. Only

remaining discovery has to do with experts depositions; depositions to be held once the summary judgment has been decided, if necessary. Counsel to check with their clients to see if they agree to mediation. (lau) (Entered 06/18/1998)

* * *

03/26/1999 42 SUPPLEMENTAL Memorandum of law by Willard T. Stewart re: Contra Defendant's motion for summary judgment, filed; c/s. (sat) (Entered: 03/26/1999)

03/29/1999 43 Judge Reginald C. Lindsay. Clerk's Notes: re: motion hearing held. After oral argument, court ruled from the bench, granting [18-1] motion for summary judgment, and denying [23-1] motion for summary judgment, all for reasons stated on the record. Court Reporter: Teri Gibson (sat) (Entered: 03/30/1999)

* * *

04/19/1999 45 Notice of appeal by Willard T. Stewart filed. Appeal record due on 5/19/99 (lau) (Entered: 04/20/1999)

* * *

06/09/1999 47 Motion by Willard T. Stewart to stay pending appeal, filed; c/s. (sat) (Entered: 06/09/1999)

* * *

06/15/1999 49 Response by Dutra Construction in opposition to [47-1] motion to stay pending appeal, filed. (seh) (Entered: 06/16/1999)

* * *

10/06/1999	56	Motion by Willard T. Stewart for rehearing, filed. (sat) Modified on 10/27/1999 (Entered: 10/06/1999)
		* * *
10/26/1999	61	Response by Dutra Construction in opposition to [56-1] motion for rehearing, filed; c/s. (sat) (Entered: 10/27/1999)
		* * *
12/17/1999		Judge Reginald C. Lindsay. Endorsed Order entered denying [56-1] motion for rehearing. [EOD Date 12/21/99]. Copy sent to counsel on 12/21/99. (sat) (Entered: 12/21/1999)
		* * *
01/05/2000	65	Notice of appeal by Willard T. Stewart filed. Appeal record due on 2/4/00 (sat) (Entered: 01/06/2000)
		* * *
11/21/2000	69	Opinion of the Court of Appeals re: [65-1] appeal, [45-1] appeal, entered. (jr) (Entered: 11/21/2000)
11/29/2000	70	Mandate of US Court of Appeals re: [65-1] appeal, [45-1] appeal affirming the judgment of the district court. (jr) (Entered: 11/29/2000)
		* * *
11/05/2001	81	Motion by Dutra Construction for RENEWED summary judgment on all remaining counts, filed; c/s. (sat) (Entered: 11/06/2001)
11/05/2001	82	Memorandum by Dutra Construction in support of [81-1] motion for RENEWED

		summary judgment on all remaining counts, filed; c/s. (sat) (Entered: 11/06/2001)
		* * *
02/08/2002	88	Response by Willard T. Stewart in opposition to [81-1] motion for RENEWED summary judgment on all remaining counts, filed; c/s. (sat) (Entered: 02/08/2002)
		* * *
05/21/2002		Judge Reginald C. Lindsay. Endorsed Order entered granting [81-1] motion for RENEWED summary judgment on all remaining counts.... Motion allowed based on the application of Morehead v. Atkinson-Kiewit, 97 F.3s 603 (1st Cir. 1996) to the undisputed facts of record in this case. [EOD Date 5/21/02]. Copy sent to counsel on 5/21/02. (sat) (Entered: 05/21/2002)
05/21/2002	90	Judge Reginald C. Lindsay. Judgment on all counts entered for Dutra Construction against Willard T. Stewart. [EOD Date 5/21/02]. Copy sent to counsel on 5/21/02. (sat) (Entered: 05/21/2002)
05/21/2002		Case closed. (sat) (Entered: 05/21/2002)
05/30/2002	91	Notice of appeal by Willard T. Stewart filed. Appealing: [90-1] judgment order. Appeal record due on 6/14/02 (kf) (Entered: 05/31/2002)
		* * *
09/30/2003	92	MANDATE of USCA as to [91] Notice of Appeal filed by Willard T. Stewart; This cause came on to be heard on appeal from the United States District Court for

the District of Massachusetts, and was argued by counsel. Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district Court's grant of summary judgment is affirmed. (Ramos, Jeanette) (Entered: 09/30/2003)

* * *

U.S. Court of Appeals for the First Circuit
No. 99-1487

4/27/99	CIVIL CASE docketed. Notice filed by Appellant Willard Stewart. [99-1487] (eiln) [99-1487]
	* * *
3/15/00	BRIEF filed by Appellant Willard Stewart in 99-1487. Pages: 44, Copies: 9, delivered by mail. Certificate of service date 3/15/00. [462726-1] Appellee brief due 4/14/00. [99-1487] (eiln) [99-1487]
3/15/00	APPENDIX filed by Appellant Willard Stewart in 99-1487. Copies: 5. Volumes: 1. Delivered by mail, filed. Certificate of service date 3/15/00 [462727-1] [99-1487] (eiln) [99-1487]
4/14/00	BRIEF filed by Appellee Dutra Construction in 99-1487, Appellee Dutra Construction in 00-1090. Pages: 31, Copies: 10, delivered by hand. Certificate of service date 4/14/00. [465855-1] Reply brief due 4/28/00 in 99-1487, in 00-1090. [99-1487, 00-1090] (lina) [00-1090 99-1487]
	* * *
4/14/00	DISCLOSURE STATEMENT on behalf of Appellee Dutra Construction filed. [99-1487] (lina) [99-1487]
4/17/00	PETITION filed by Appellant Willard Stewart in 99-1487, and 00-1090 Petition for initial hearing en banc. Certificate of Service dated 4/17/00. [99-1487, 00-1090] (eiln) [00-1090 99-1487]
	* * *

6/14/00 ORDER filed by Chief Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Michael Boudin, Judge Norman H. Stahl, Judge Sandra L. Lynch, Judge Kermit V. Lipez denying petition request for hearing enbanc. [99-1487, 00-1090] in 99-1487, 00-1090 (eiln) [99-1487]

6/14/00 ORDER filed by Chief Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Michael Boudin, Judge Norman H. Stahl, Judge Sandra L. Lynch, Judge Kermit V. Lipez denying petition request for hearing enbanc. [99-1487, 00-1090] in 99-1487, 00-1090 (eiln) [99-1487]

* * *

9/7/00 CASE ARGUED 09/07/00. Selya, Bownes, Stahl, JJ. (ceca) [00-1090 99-1487]

10/31/00 OPINION issued by Selya, Circuit Judge, Bownes, Senior Circuit Judge, and Stahl, Circuit Judge. Signed Judge Bruce M. Selya, Authoring Judge. PUBLISHED [511310-1] [99-1487, 00-1090] (turn) [00-1090 99-1487]

10/31/00 JUDGMENT entered closing case. The judgment of the district court is affirmed. [511315-1] [99-1487, 00-10901 (turn) [00-1090 99-1487]

* * *

No. 00-1090

1/28/00 ORDER filed to consolidate for purposes of briefing and oral argument the following cases: 99-1487. [00-1090] (eiln) [00-1090]

* * *

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No. 02-1713

6/12/02 CIVIL CASE docketed. Opening forms sent. Notice filed by Appellant Willard Stewart. Appearance form due 6/26/02. Docketing Statement due 6/26/02. Transcript Report/Order due 6/24/02. Fee due 6/26/02. [02-1713] (mlyn)

6/12/02 RECORD filed: Pleading included: 1-91. No Transcript(s) filed. [663149-1] [02-1713] (mlyn)

* * *

11/15/02 BRIEF filed by Appellant Willard Stewart. Length: 7,404 words, Copies: 9, delivered by hand. Certificate of date 11/15/02. [703492-1] Appellee brief due 12/16/02. brief due 12/30/02. [02-1713] (mlyn)

* * *

11/15/02 APPENDIX filed by Appellant Willard Stewart. Copies: 5. Volumes: 1. Delivered by hand, filed. Certificate of service date 11/15/02. [703494-1] [02-1713] (mlyn)

12/16/02 DISCLOSURE STATEMENT on behalf of Appellee Dutra Construction filed. [02-1713] (mlyn)

* * *

1/17/03 ORDER filed by Judge Juan R. Torruella, Judge Sandra L. Lynch, Judge Jeffrey R. Howard. Upon consideration of motion, It is hereby granted that appellant's reply brief be accepted for filing this day. [02-1713] (mlyn)

1/17/03 REPLY BRIEF filed by Appellant Willard Stewart. Length: 6 pgs, Copies: 8, delivered

by hand. Certificate of service date 1/15/03. [718483-1] [02-1713] (mlyn)

* * *

9/4/03 JUDGMENT filed Judge Juan R. Torruella, Judge Sandra L. Lynch, Judge Jeffrey R. Howard. This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel. Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's grant of summary judgment is affirmed. [785881-1] [02-1713] (mlyn)

9/4/03 OPINION: Judge Juan R. Torruella, Judge Sandra L. Lynch, Judge Jeffrey R. Howard. Signed Judge Juan R. Torruella. PUBLISHED. [785884-1] [02-1713], (mlyn)

* * *

12/12/03 U.S. SUPREME COURT NOTICE filed regarding petition for writ of certiorari. Filed in the Supreme Court on 12/3/3. Supreme Court case number: 03-814. [02-1713] (darl)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLARD T. STEWART Plaintiff, v. DUTRA CONSTRUCTION CO., INC. Defendant.	)	CIVIL ACTION NO. 95-11046 (RCL)

AMENDED COMPLAINT
JURY TRIAL DEMANDED

(Filed Sept. 12, 1996)

FIRST CAUSE OF ACTION

Plaintiff hereby claims of the defendant a sum in excess of One Hundred Thousand Dollars ($100,000.00) in damages upon the following causes of action:

1. Plaintiff is a seaman.

2. This action is brought pursuant to the Maritime Law of the United States as modified by the Jones Act, 46 U.S.C. §688, *et seq*.

3. At all times material hereto, defendant, Dutra Construction Company, Inc., was doing business at 347 Congress Street, Suite 204, Boston, Massachusetts.

4. At all times material hereto, plaintiff was in the employ of the defendant as a member of the crew of defendant's #4 scow to the dredge "SUPER SCOOP" at the rate of pay and for the terms as set forth in his contract of employment.

5. On or about July 15, 1993, while the said scow and dredge were in Boston Harbor, Boston, Massachusetts, plaintiff suffered injuries while under the employment of defendant.

6. Plaintiff's injuries were caused by the negligence of the defendant, by its agents, servants, workmen and employees, by the unseaworthiness of the scow and dredge, and by the defendant's breach of its obligations under the circumstances.

7. Solely by reason of the negligence of the defendant, plaintiff sustained personal injuries.

WHEREFORE, plaintiff demands judgment against the defendant in excess of the sum of One Hundred Thousand Dollars ($100,000.00), with costs and interest, and brings this action to recover same.

SECOND CAUSE OF ACTION

In Admiralty

Plaintiff claims of defendant maintenance and cure and wages in such amount as may be determined by the Court upon the following cause of action:

8. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 7 inclusive of this complaint, with the same force and effect as if fully set forth and repeated herein.

9. Plaintiff, by virtue of his services upon the said scow and dredge, claims maintenance and cure and wages for the period off this disability in an amount which to your Honorable Court shall deem just and proper upon the trial of this cause.

10. All and singular, the premises contained herein are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

WHEREFORE, plaintiff prays that judgment be entered against the defendant for such maintenance and cure and wages as the court may determine to be due and owing upon the trial of this cause, and for such interest, costs, and counsel fees as the court may deem just and proper.

THIRD CAUSE OF ACTION

11. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 10 inclusive of this Complaint, with the same force and effect as if fully set forth and repeated herein.

12. Jurisdiction herein arises under the Longshore and Harbor Workers' Compensation Act Amendments of 1972. Public Law No. 92576, §18(a), 86 Stat. 1263, 33 U.S.C. §905 amending §5 of the Longshore and Harbor Workers' Compensation Act, Ch. 509, §5, 44 Stat. 1426, 33 U.S.C. §905 (LHWCA).

13. Plaintiff's injuries were caused by the negligence of the defendant, its agents, servants, and/or employees and/or ostensible agents, servants, and/or employees and/or the unseaworthiness of the "SUPER SCOOP" in the following respects, including but not limited to:

(a) failing to provide a safe place for plaintiff to perform his duties;

(b) failing to provide plaintiff with proper, safe, seaworthy, and/or adequate vessel appliances, gear, appurtenances, and/or equipment;

(c) failing to properly and adequately inspect, maintain, and/or repair the vessel's gear, lines, shackles, deck, and/or appurtenances in a safe and seaworthy condition;

(d) failing to warn plaintiff and/or his co-workers of a defective, dangerous, and/or hazardous condition of the vessel's gear, lines, shackles, deck, and/or appurtenances when defendant knew or should have known of such condition;

(e) failing to inspect, remove, remedy, and/or correct a defective, dangerous, and/or hazardous condition when defendant knew or should have known of its existence;

(f) failing to discover, in the exercise of reasonable care, a defective, dangerous, and/or hazardous condition of the vessel;

(g) permitting a defective, dangerous, and/or hazardous condition to exist;

(h) failing to take proper and necessary precautions and/or steps to prevent injury;

(i) failing to comply with governmental and/or other applicable safety regulations;

(j) failing to observe safe boating methods, practices, and/or procedures during the boom-jump operation;

(k) failing to properly remove, store, clean, and/or clear poly bags, trash, and/or other items from all boat deck working surfaces;

(l) failing to properly and adequately coat the boat decking surface with anti-slip and/or other non-skid materials;

(m) failing to use due care under the circumstances and being otherwise negligent under defendant's rules, regulations, customs, and/or practices; and

(n) otherwise being careless, reckless, and/or negligent in the maintenance and/or operation of the vessel.

14. The injuries in question were caused solely by the negligence of defendant, its agents, servants, and/or employees and/or ostensible agents, servants, and/or employees and were due in no manner to any act and/or omission on the part of plaintiff.

15. As a direct and proximate result of the negligence of defendant, plaintiff has suffered, and will in the future continue to suffer, pain and hardship, loss of income, medical expenses, and an inability to perform his usual duties.

WHEREFORE, plaintiff demands judgment against the defendant in excess of the sum of One Hundred Thousand Dollars ($100,000.00), with costs and interest, and brings this action to recover same.

LAW OFFICES OF THOMAS J. HUNT

By: /s/ Thomas J. Hunt
Thomas J. Hunt, Esquire
One Union Street
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and

MARVIN I. BARISH LAW OFFICES, P.C.

By: /s/ Marvin I. Barish
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ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

WILLARD STEWART Plaintiff	)	CIVIL ACTION NO. 95-11046-RCL
Vs.	)	
DUTRA CONSTRUCTION CO., INC., Defendant	)	

DEFENDANT, DUTRA CONSTRUCTION CO., INC.'S, MOTION FOR SUMMARY JUDGMENT

(Filed Sept. 16, 1996)

Now comes the defendant, Dutra Construction Co., Inc. and asks the Court to grant it Summary Judgment on all counts. As grounds, therefore, the defendant argues that there is no genuine issues of material fact and the defendant is entitled to a judgment as a matter of law. Specifically, the Court should find as a matter of law that the plaintiff is not a seaman within the meaning of the Jones Act (46 U.S.C. 688) and has no standing to bring a claim pursuant to the Jones Act or the doctrine of maintenance and cure.

The plaintiff has recently filed a motion for leave to amend complaint to add a count under Section 905B of the Longshore and Harbor Workers' Compensation Act. It is the defendant's position that as a matter of law the plaintiff is not entitled to Section 905B benefits. The defendant reserves the right to supplement its Motion for Summary Judgment if the Court allows the plaintiff to amend its complaint.

In support of this Motion, the defendant refers to and incorporates herein the attached Memorandum of Law, relevant portions of the transcript of the plaintiff's deposition and the Complaint.

"REQUEST FOR ORAL ARGUMENT"

The defendant believes that oral argument will assist the Court in deciding this matter and therefore requests to be heard.

By its attorneys,

/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.,
BBO# 544538
PEABODY & ARNOLD
50 Rowes Wharf
Boston, MA 02110
617/951-2100

CERTIFICATE OF SERVICE

I, Frederick E. Connelly, Jr., hereby certify that I have this 12th day September, 1996 served a copy of the foregoing upon the plaintiff by mailing same postage prepaid to:

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/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

WILLARD STEWART Plaintiff	)	CIVIL ACTION NO. 95-11046-RCL
Vs.	)	
DUTRA CONSTRUCTION CO., INC., Defendant	)	

DEFENDANT, DUTRA CONSTRUCTION CO., INC.'S, MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The defendant, Dutra Construction Co. ("Dutra"), asserts that no genuine issues of material fact exist in this case, and submits the following memorandum in support of its Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56(c).

I. CONCISE STATEMENT OF MATERIAL FACTS OF RECORD AS TO WHICH IT IS CONTENDED THAT THERE EXIST NO GENUINE ISSUE TO BE TRIED

The plaintiff, Willard Stewart ("Stewart") was injured on July 15, 1993 while employed by Dutra. Stewart was hired to work on the dredge Superscoop. Ninety-nine percent of his time while on the job was on the Superscoop

(Stewart Deposition Transcript at 33, Ex "A").[1] Dutra was hired to perform drilling, blasting and dredging for an immersed tube tunnel (later to be christened the Ted Williams Tunnel). This was the first time Stewart had worked for Dutra (S. Tr. at 28, Ex "A"). The plaintiff was hired as an engineer (S. Tr. at 34, Ex "A").

The Superscoop is a dredge (S. Tr. at 31, Ex "A") which does its digging with a clamshell bucket (S. Tr. at 31, Ex "A"). The Superscoop's only form of propulsion was its anchors and cables (S. Tr. at 35, Ex "A"). The Superscoop does not have a propeller. (*Id.*) While on the job, over a twelve hour period, the Superscoop would be moved six times and the average move was between thirty and fifty feet (S. Tr. at 35, Ex "A"). Each move would take approximately five Minutes. (*Id.*) The remainder of the time the Superscoop would be in one location for dredging (S. Tr. at 36, Ex "A"). While dredging, the Superscoop would be secured by four anchors. (*Id.*)

The Superscoop did not contain sleeping quarters. The workers were brought to shore after each shift by a work boat (S. tr. at 32, Ex "A"). The plaintiff was living in East Boston (S. Tr. at 38, Ex "A").

At the time the plaintiff was injured, he was on Scow #4 working on the wiring (S. Tr. at 53, Ex "A"). The Scow was tied up along side the Superscoop. The Scow was out of commission and no dredging had been done that day (S. Tr. at 49, Ex "A"). The engine on the scow that controlled

[1] The deposition transcript of Willard Stewart shall herein after be referred to as "S. Tr."

the hopper had been replaced (S. Tr. at 45, 46, Ex "A"). The plaintiff was not wearing a life vest (S. Tr. at 65, Ex "A").

In his complaint, the plaintiff alleges that his injuries were caused by the negligence of the defendant, its agents, servants, workmen and employees, by the unseaworthiness of the dredge, and by the defendant's breach of its obligations under the circumstances (Stewart Complaint, Ex "B").

Stewart brought suit against his employer, Dutra Construction Co. pursuant to the Jones Act, 46 U.S.C. §688 *et seq* and the doctrine of maintenance and cure. (*Id.*) The plaintiff alleges that he was a member of the crew of defendant's dredge "Superscoop". (*Id*). On September 3, 1996 the plaintiff filed a motion for leave to amend the complaint and to add a third count. The defendant reserves the right to address this count if the Court allows plaintiff's motion despite the late filing. (In this last cause of action, the plaintiff makes a claim under §905 of the Longshore and Harbor Workers' Compensation Act Amendments of 1972.)

II. ARGUMENT

A. Summary Judgment is Appropriate when there is No Genuine Issue of Material Fact

Fed. R. Civ. P. 56(c) provides that a summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." The non-moving party must come forward with proof that a *genuine* issue of *material* fact precludes judgment if a motion for

summary judgment is properly supported. *Thomas v. Digital Equipment Corporation,* 880 F. 2d 1486, 1489 (1st Cir. 1989) (emphasis in original), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d. 202 (1986). *See also Mack v. Great Atlantic and Pacific Tea Company,* 871 F. 2d 179, 181 (1st Cir. 1989), *United States v. One Parcel of Real Property,* 900 F. 2d 470, 474 (1st Cir. 1990). A defendant moving for summary judgment is entitled to have its motion allowed if it produces evidence demonstrating the absence of a genuine issue of material fact with respect to an essential element of the plaintiff's claim and the plaintiff cannot come forward with "genuine" evidence to rebut the motion. *Celotex Corporation v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552-2553, 91 L. Ed. 265 (1986).

The U.S. Supreme Court has held that determination of seaman status under the Jones Act is a mixed question of fact and law. *McDermott International, Inc. v. Wilander,* 498 U.S. 337, 358 111 S. Ct. 807, 112 L. Ed. 2nd 866 (1991). However, the Court went on to say that summary judgment is "mandated where the facts and the law will reasonably support only one conclusion". *Id* at 356. Such is the case here. That summary judgment is appropriate in some circumstances was reasserted by the Supreme Court in *Chandris v. Latsis*, 115 S. Ct. 2172, 2191 (1995). The court wrote that where undisputed facts reveal that a maritime worker has a clearly inadequate temporal connection to vessels in navigation, the court may take the question from the jury by granting summary judgment. *Id.*

Dutra maintains that when the law of the First Circuit is applied to the facts in this case, the only conclusion is that Stewart was not a Jones Act seaman working

on a vessel. Likewise, he is not entitled to recover pursuant to the General Maritime Law for unseaworthiness.

B. The Plaintiff is Not Entitled to Recover as a Jones Act Seaman Employed on a Vessel and His Claim Should be Dismissed as a Matter of Law.

The Jones Act, 46 U.S.C. 688, states that:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law.

1. The Plaintiff Was Not a Seaman Under the Jones Act. – *DiGiovanni v. Taylor Brothers*

The plaintiff has the burden of establishing that he qualifies as a "seaman" under the Jones Act. *Bernard v. Binnings Construction Co. Inc.* 741 F. 2d 824, 827 (5th cir. 1984). The plaintiff is a "seaman" for the purposes of the Jones Act if he proves by a preponderance of evidence that "(1) he was assigned permanently to a "vessel" or performed a substantial part of his work on a vessel, *and* (2) he performed duties which contributed to the function or operation of the vessel during a trip or at anchorage in preparation for a trip or which contributed to the mission of a trip. *Dean v. McKie Co.* 771 F Supp 466, 470 (D. Mass. 1991); *Morris v. Massachusetts Maritime Academy,* 409 Mass 179, 192, 565 N.E. 2d 422, 430 (1991). *See also Bennett v. Perini Corporation,* 510 F. 2d 114, 115 (1st cir. 1975). In every instance the Court must first decide whether the structure in question was a vessel.

The United States Court of Appeals, First Circuit decided the issue of what constitutes a vessel under the

Jones Act in the case of *DiGiovanni v. Taylor Brothers Inc.* 959 F. 2d 1119 (1st Cir. 1992). Finding that past decisions in both the first and fifth circuits "produced a difficult dividing line" *Id.* at 1122, the Court decided to look first at the *use* of the structure rather than simply to the physical characteristic in deciding whether a structure is a vessel under the Jones Act. *Id.* at 1123. In summation the Court wrote:

> if a barge, or other float's purpose or primary business is not navigation or commerce, then workers assigned thereto for its shore enterprise are to be considered seaman only when it is in actual navigation or transit. *Id.* at 1123.

In applying this simplified and effective rule to the facts presented it, the *DiGiovanni* court denied the plaintiff Jones Act recovery. Those facts were set forth by the court as follows:

> Briefly, the facts are these. The BETTY F was a barge, 100 feet in length, with a 40 foot beam and a raked bow and stern, and with nautical equipment, such as navigation and anchor lights. In all respects it met the commonly understood characteristics of a vessel, and, indeed, was inspected by the Coast Guard. It had no means of self-propulsion, except that positional movement could be achieved by manipulating its spud anchors. Its current use was to float at the Jamestown, Rhode Island, bridge, bearing a crane that was being used for bridge construction. Its permanent station was Davisville, Rhode Island, from which it was towed, by a tug, from time to time, to perform various shore jobs. It had been at the Jamestown bridge for a month. It was positioned about the bridge, and moved away from the pilings at night, to prevent damage.

> Plaintiff's principal duty was to handle a tag line to guide the crane, but he also did maintenance work, such as painting, and tended lines. Although he was attached to the BETTY F, at the time of his injury he was standing on the deck of a supply barge in order better to manipulate the line. Its deck proved to be slippery, and he fell. The supply barge was in general use to carry supplies, but also served as a work platform. *Id.* at 1120, 1121.

The use of the barge in the *DiGiovanni* case is very similar to the way the Superscoop barge was used by Dutra. The Superscoop has many of the same characteristics as the BETTY F. It contains some nautical equipment and was inspected by the Coast Guard. Like the BETTY F the Superscoop had no means of self-propulsion, except that positional movement could be achieved by use of winches and anchors. (S. Tr. at 35, Ex "A") Its use in Boston Harbor was to float bearing a crane that was used for dredging to lay a tunnel (as opposed to bridge construction). Like the BETTY F, the Superscoop was towed to the site by tug. (S. Tr. at 31, Ex "A") The Superscoop was more stationary than the Betty F, which had to be moved away from the bridge every night.

The *DiGiovanni* court went on to say that looking to the use of the structure, rather than simply to the physical characteristics of the structure, does appear a reasonable resolution of Jones Act principles as against mere definitions of vessels. *Id.* at 1123. If a structure is operational in navigation than a worker is entitled to seaman status no matter the characteristics of the structure. Just as clearly, if the worker on a barge is not in navigation he is not covered under the Jones Act. A worker is not exposed to seaman's hazards "by what the vessel did in the past, or by

its future potential". *Id.* at 1123. Therefore, Stewart can find no support for his claim of being a Jones Act seamen by the fact that the Superscoop may have been used in some sort of navigation before his accident or may be so used in the future. There is no dispute that at the time he was injured the Superscoop was stationary and that during the Boston Harbor project it was used as a platform for a dredging crane.

The Superscoop fails to meet the "vessel" test and definition set forth in *Bernard v. Binnings Construction Co.* 741 F.2d 824 (5th cir. at 1984) and adopted by the First Circuit in *DiGiovanni*:

> Floating is not enough *Id.* at 828. Nor is capability of movement across navigable water *Id.* at 829. Rather, the test is whether it was designed or used primarily for the transportation of cargo, equipment or persons across navigable waters or was, at the time of Bernard's injuries, engaged in navigation. *DiGiovanni* at 1123.

The *DiGiovanni* court, satisfied it now had a workable rule, applied the rule for the sake of comparison to the facts in the Supreme Court case of *Southwest Marine Inc. v. Gizoni* 112 S.Ct. 486, 494 cited at *DiGiovanni,* 1123. In *Gizoni* the worker was a ship repairer who at the time of his accident was on a work platform engaged in transporting a rudder to a ship. He was injured when his foot went through the deck. In discussing the *Gizoni* case the *DiGiovanni* court wrote: "The platform, in other words, at the time of plaintiff's injury, was engaged in transportation, and the plaintiff was a participant in that operation. Under our rule we would be more favorable to the worker than was the *Gizoni* court." *Id.* at 1124. While the *Gizoni* court remanded the case, the *DiGiovanni* court if presented

with the same facts would have ruled as a matter of law that the plaintiff was a seamen. *Id.* at 1124.

The court was very clear in pointing out that Mr. DiGiovanni does not measure up to the plaintiff in *Gizoni*. The movement of the barge "about the piers for working convenience and at night for safety . . . This was hardly navigation or commerce, and did not diminish the primary nature of the platform's shore use and purpose." *Id.* at 1124. The *DiGiovanni* court held as a matter of law that Mr. DiGiovanni was not entitled to Jones Act recovery. Presented with the facts in Stewart, there is no doubt that following the rule as set forth in *DiGiovanni,* as a matter of law the plaintiff's claim for Jones Act recovery must be denied. Stewart is no more of a seaman than was DiGiovanni.

2. <u>The First Circuit's Decision in *DiGiovanni* is Now Widely Followed</u>

The United States District Court, E.D. New York in the matter of *Tonnesen v. Yonkers Contracting Co* 847 F. Supp. 12 (E.D. N.Y. 1994) wrote:

> other courts, including the court of appeals for the ninth circuit, have followed the first circuit's holding in *DiGiovanni. See Kathriner v. UNISEA, Inc.* 975 F. 2d. 657, 661 (9th cir 1992); *Hatch v. Durocher Dock & Dredge, Inc.* 820 F. Supp 314, 316 (E.D. Mich. 1993). The Court could not locate any courts which had rejected *DiGiovanni,* or applied an alternative standard. *Id.* at 15.

The Court added:

> The Court concludes that this standard is well reasoned, clear, and easy to apply. Most importantly the Court concludes that the first circuits analysis correctly applies the law as enumerated by the Supreme Court in *Wilander* and *Gizoni*. *Id.* at 16.

Many of the recent cases share facts similar to those in Duncan. In *Tonnesen* the plaintiff was injured when he was struck by a wooden building form that swung free while suspended from the crane on the barge on which plaintiff worked. *Id.* at 14. Like the Superscoop, the barge in *Tonnesen* was a "crane barge" which only moved in navigation while being towed to and from a work site, and when changing position at the site. *Id.* Applying the *DiGiovanni* standard, the Court first determined the primary purpose of the "vessel". *Id.* at 15. The Court further cited *DiGiovanni:*

> If the primary purpose in navigation (i.e. the transportation of people or goods on the water) then the vessel is presumed to be in navigation. See *Id.* at 1122. If the primary purpose is other than navigation then the question of whether the worker is there to perform a maritime function or a shore enterprise must be answered. See *Id.* If the worker's function is not maritime (i.e. furthering the navigation of the structure at sea) then the worker is only considered a seaman when the structure is [in navigation] (i.e. moving) see *Id.* at 15.

Stewart fares no better than did Mr. Tonnesen in claiming Jones Act seaman status. The primary purpose of the Superscoop is dredging, work which is performed with the crane. The plaintiff can not seriously argue otherwise.

There is no evidence that the Superscoop was involved in the transportation of goods or people (i.e. navigation). If the Superscoop's purpose is not navigation then the plaintiff's function is not navigation and thus not maritime. Also, the building of a tunnel to be used by automobiles is no more a maritime function than the building of a bridge for the same purpose. Therefore, Stewart is left to prove the Superscoop was in navigation at the time of the accident. It was not. The Superscoop was stationary. It is not enough that the barge could move up and down with the tide. *Id.*

The same conclusion has been reached in other cases with facts nearly identical to those facing the Court in *Stewart*. In *Nielsen v. Weeks Marine Inc.* 910 F. Supp. 84 (E.D.N.Y 1995) the plaintiff worked on a derrick barge renovating certain ships and piers on Staten Island. *Id.* at 86. Like the Superscoop the barge in Nielsen could not travel independently through open waters but could move by its own cables by using anchors and motorized winches. *Id.* The Court held that:

> The fact that plaintiff on occasion participated in handling the lines as the barge was moved along the pier did not transmogrify it into a vessel in navigation. Since plaintiff had no relationship to a vessel in navigation he has no claim under the Jones Act. *Id.* at 88.

Likewise, the fact that Stewart may have tended lines or worked on the anchor winches on occasion as one of his duties of a deck hand does not transform the Superscoop into a vessel in navigation.

In *Hatch v. Durocher Dock & Dredge, Inc.* 33 F.3d 545 (6th cir. 1994), the Sixth Circuit Court of Appeals found

DiGiovanni to be well reasoned and highly persuasive. In *Hatch* the "deckhand/pile driver was assigned to a derrick barge with no internal propulsion system and used as a piledriver in a dock building project. Plaintiff sometimes helped to move the barge. He injured his back stepping from a platform onto the barge. Since the barge's primary purpose was construction rather than transportation and was not "actually underway" when plaintiff was injured, the Court granted Defendant's Motion for Summary Judgment. See *Id.* at 548. The Court added:

> It is clear, however, that a plaintiff alleging seaman status must at a minimum show that the purported vessel was "in navigation" at the time of the injury. *Id.*

Stewart can not meet this minimum prerequisite.

While many of the cases cited involve the construction of bridges, use of the Superscoop to dredge for a tunnel makes it no more of a vessel than the other crane barges. All are being used as work platforms.

3. <u>Cases Cited by the Plaintiff are Distinguishable or Not Relevant.</u>

Counsel for the plaintiff recently filed an opposition to a motion for summary judgment filed by Dutra in an action with nearly identical issues. The defendant anticipates that Stewart will rely upon many of the same arguments and addresses them here.

The plaintiff is expected to cite the case of *McDermott International, Inc. v. Wilander,* 498 U.S. 337 (1991) for the proposition that there is no requirement that an employee aid in the navigation of a vessel in an order to qualify as a

Jones Act Seaman. This issue is not in dispute. The defendant acknowledges that Stewart's duties contributed to the function of the Superscoop. The relevant issue is whether the Superscoop is a vessel pursuant to the Jones Act. That issue was never before the *McDermott* court, a case that was dealing not with a work platform but the American-Flag Vessel M/V Gates Tide, a paint boat. The court in *McDermott* wrote "The question presented here is narrow. . . . we are asked only if Wilander should be precluded from seaman status because he did not perform transportation-related functions on board." *Id* at 356, 357.

The plaintiff will also cite the 1995 Supreme Court case of *Chandris v. Latsis,* 115 S. Ct. 2172 (1995). While the Court in *McDermott* addressed the type of activities a worker must perform to fall within the protection of the Jones Act, the *Chandris* court determined "what relationship a worker must have to the vessel" in order to obtain seaman status. *Id* at 2181. As in *McDermott,* whether or not the "structures" were vessels under the Jones Act was not in question and thus not an issue. The subject vessels in *Chandris* consisted of six passenger cruise ships. Whether the structure was a "vessel in navigation" was also not in question in *Chandris.* At the time of his injury, the plaintiff was on board one of the cruise ships sailing to Bermuda. *Id.* Therefore, answering the two part *Chandris* test in the affirmative is irrelevant to the issue whether the Superscoop was a vessel in navigation. It should be pointed out that the Court in *Chandris* was not unaware of the First Circuit's decision in *DiGiovanni* and cited *DiGiovanni. Id.* at 2192. At no point did the *Chandris* court address the rule for seaman established by the *DiGiovanni* court.

The plaintiff may also cite cases from the Fifth Circuit *(Offshore Company v. Robison,* 266 F.2d 769 (5th Cir. 1959) and *Ducote v. Keeler & Co., Inc.,* 953 F.2d 1000 (5th Cir. 1992)) which the *DiGiovanni* court has specifically decided not to follow or would surely have rejected.

The holding by the first circuit in *DiGiovanni* that the barge's prior use or future use is irrelevant, is a clear rejection of the fifth circuits thinking in *Ducote.* The *Ducote* court reversed the district court's summary judgment for the defendant and remanded the case. *Id.* at 1004. In *Ducote* the plaintiff was operating a dragline/crane from the deck of a spud barge. He was in the process of driving piles at the time he was injured.

In reversing the lower court the court in *Ducote* focused on two factors. First, the court looked at "the purpose for which this barge was constructed". *Id.* at 1003. Secondly, the court looked at the future use of the barge during the project. The court wrote "the scope of the project, however, called for the spud barge to be moved approximately five miles along the bank of the Red River. This planned movement distinguishes this spud barge from the structures in the *Cook* line of cases". *Id.* at 1004. This way of thinking was rejected by the first circuit in *DiGiovanni.* The *DiGiovanni* court made clear that it was more interested in the use of the barge at the time of the plaintiff's injury and not the shape of the barge or its potential use in the future.

III. CONCLUSION

The evolution of the definition of "seamen" and "vessel" in the First Circuit for purposes of recovery under the Jones Act bars the plaintiff from recovery in this case. The

same standards apply to Count II of the plaintiff's complaint (Maintenance and Cure). There exists no genuine issue of material fact in this case, and summary judgment should enter for Dutra Construction Co. on all counts.

By its attorneys,

/s/ Frederick E. Connelly, Jr.
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CERTIFICATE OF SERVICE

I, Frederick E. Connelly, Jr., hereby certify that I have this day September, 1996 served a copy of the foregoing upon the plaintiff by mailing same postage prepaid to:

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/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.

EXHIBIT "A"

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
CA # 95-11046 (RCL)
WILLARD T. STEWART
Plaintiff
VS.
DUTRA CONSTRUCTION CO., INC.
Defendant

DEPOSITION OF WILLARD T. STEWART, taken pursuant to Notice under the applicable provisions of the Massachusetts Rules of Civil Procedure on behalf of the Defendant, before Joan M. Barry, a Notary Public in and for the Commonwealth of Massachusetts, at the offices of Peabody & Arnold, 50 Rowes Wharf, Boston, Massachusetts, on Tuesday, May 21, 1996, commencing at 11:30 a.m.

NEAL A. SALLOWAY – COURT REPORTERS
FIVE CARDIGAN ROAD
WEST PEABODY, MA 01960
(617) 581-3993 – (508) 535-0313

APPEARANCES:

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(by Frederick E. Connelly, Jr., Esq.)
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Boston, Massachusetts 02110
On behalf of the Defendant
MARVIN E. BARISH, ESQ.

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Philadelphia, Pennsylvania 19106
On behalf of the Plaintiff

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DEPONENT	DIRECT	CROSS
Willard T. Stewart		
By Mr. Connelly	4	

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[4] MR. NESTER: I would like him to read and sign. Okay. I'll explain that to him afterwards. We'll waive notary. He doesn't have to do it in front of a notary.

MR. CONNELLY: All objections reserved until the time of trial, except as to form. All motions to strike are reserved. As far as reading and signing, twenty-one days will be enough time once he receives it?

MR. NESTER: Once I receive it, it should be. If that's problematic, I'll let you know.

WILLARD T. STEWART

having been first duly sworn, deposes and testifies as follows:

EXAMINATION

BY MR. CONNELLY:

Q. Mr. Stewart, my name is Frederick Connelly, and I represent the defendant, Dutra Construction Company. I am going to be asking you some questions today.

I first want to go over a few groundrules so the proceedings will go a little smoother. You may have discussed some of this with your attorney already. You're going to have to answer each question outloud, okay, and

* * *

[28] A. Uh-huh

Q. So, for those ten years, you were assisting them in building an island, right?

A. They were still working on it.

Q. What is that island for?

A. Containment area for dredge from the Baltimore Harbor, from Baltimore Harbor and the ship channel.

Q. Where is Great Lakes located?

A. Their main office is in Chicago. They have an office in Baltimore, one in, I think, New York, and I think in Florida somewhere.

Q. Had you ever worked for Dutra before the Boston job?

A. No.

Q. So, Great Lakes job ended, and you had about four mounts off?

A. Approximately, yes.

Q. And when you were not working, would you collect unemployment?

A. Uh-huh.

Q. Yes?

A. Yes.

MR. NESTER: One second.

* * *

[31] Q. Had you ever worked on a dredge like that before?

A. That particular – every one is a little different. I have worked on that similar, but not exactly the same.

Q. All right. Describe for me this dredge. What is it called, the Super Scoop?

A. Yes.

Q. What is a Super Scoop?

A. It's a dredge, yes.

Q. Describe it for me?

A. It does, it's digging with a clamshell bucket. It's like a crane, a crane laddered on a barge.

Q. Okay. When you arrived in Boston, was the Super Scoop already here?

A. Yes.

Q. Do you know how it got here?

A. It had been here, I guess, approximately a week.

Q. Do you know how it got here?

A. I believe it was towed by a tug, I believe.

Q. From California?

A. Yes.

* * *

[33] there.

Q. Okay, and there was only one dredge on the Super Scoop?

A. Yes.

Q. And that always remained on it as far as you know?

A. Yes.

Q. How much of your time was spent on the Super Scoop during the time you were on the job?

A. I would say 99 and 9/10s.

Q. 99 and 9/10s?

A. Right.

Q. So, just about all your time was on the Super Scoop?

A. Yes.

Q. What engines on the Super Scoop did you have responsibility for?

A. The main engine on the hoist. They had two deck engines. Occasionally, if they had a problem with the boat, I would deal with that. They would ask me to come check it out, but –

Q. What boat is that?

A. The work boat they had.

[34] (Discussion held off the record.)

Q. We were discussing the engines that you are responsible for, three main ones were the main engine to hoist and the two deck engines?

A. Yes.

Q. And you had spent all your time on the Super Scoop working on those?

A. Yes.

Q. Were you the only person or engineer on the Super Scoop?

A. No. There's three engineers. Not at the same time. I mean, shift work.

Q. Okay. During your shifts, were you the only engineer on the Super Scoop?

A. Yes.

Q. Now, I take it none of these engines had anything to do with the movement of the Super Scoop and the water?

A. The deck engines do. They operate, hoist, cables and ankers and so on.

Q. What would these be used for?

A. Moving Super Scoop to do the dredging operation.

* * *

[53] Q. And you were going to say, hey, I'll help you, tell me what to do?

A. Yes, basically, yes.

Q. Did you start working with him before you were injured?

A. I wasn't working with him. He said, he had – He was finishing up with the engine, he was finishing up. I said, well, since you're all right, I'll feed the wires down through and go ahead and wire up the remote control and take care of that. That's something he would have done if I weren't there to help him.

Q. What job was this to hook it up? I don't understand. What are you hooking up?

A. They had a remote control unit. They operated a scow from the tug boat by remote control.

Q. And that was unhooked when he replaced the engine?

A. Yes. They took the top building off of the scow. They took the top building off where the wires are up through and up through and then there was the control panel down blow.

They disconnected it. So, they could take this building off and disconnected the wiring from the

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WILLARD STEWART, Plaintiff, v. DUTRA CONSTRUCTION CO., INC., Defendant.	CIVIL ACTION NO. 95-11046-RCL

DEFENDANT, DUTRA CONSTRUCTION CO., INC.'S SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

Now comes the defendant, Dutra Construction Co, Inc. ("Dutra"), and respectfully requests the Court to grant it summary judgment on all counts. Dutra submitted a Motion for Summary Judgment with respect to all counts of the plaintiff's original Complaint. Since that time, the court has allowed the plaintiff to amend his Complaint to add a count under Se tion 905(b) of the Longshore and Harbor Workers' Compensation Act. Having reserved its rights to supplement its initial Motion for Summary Judgment, the defendant hereby submits its Supplemental Motion for Summary Judgment and argues that there is no genuine issues of material fact and that the plaintiff is not entitled to Section 905(b) benefits as a matter of law.

In support of its Supplemental Motion, Dutra refers to and incorporates herein the attached Memorandum of Law, relevant portions of the transcript of the plaintiffs deposition and the Amended Complaint.

REQUEST FOR ORAL ARGUMENT

The defendant believes that oral argument will assist the court in deciding this matter and therefore requests to be heard.

By its attorneys,

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CERTIFICATE OF SERVICE

I, Frederick E. Connelly, Jr., hereby certify that I have this 17 day of October, 1996, served a copy of the foregoing upon the plaintiff by mailing same postage prepaid to:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WILLARD STEWART, Plaintiff, v. DUTRA CONSTRUCTION CO., INC., Defendant.	CIVIL ACTION NO. 95-11046-RCL

DEFENDANT, DUTRA CONSTRUCTION CO., INC.'S MEMORANDUM IN SUPPORT OF ITS SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

The defendant, Dutra Construction Co. ("Dutra"), incorporates herein by reference its Memorandum in Support of its Motion for Summary Judgment and submits the following memorandum in support of its Supplemental Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56(c). Dutra asserts that no genuine issues of material fact exist in this case and that Dutra is entitled to summary judgment as a matter of law on all counts of the plaintiff's Amended Complaint.

I. CONCISE STATEMENT OF MATERIAL FACTS OF RECORD AS TO WHICH IT IS CONTENDED THAT THERE EXISTS NO GENUINE ISSUES TO BE TRIED

The plaintiff was hired by Dutra out of the union hall in late 1992 (Stewart Deposition Transcript at 26, Exhibit

"A").[1] He was responsible for maintaining the engines on the Superscoop (S. Tr. at 33), and generally, it was part of his job to "do what it took to get [the dredge] running again" when it shut down (S. Tr. at 50). He also checked the oil on the scows once per week or checked the engine (S. Tr. at 46). His employment duties included working on the scows, as the operation of the scows was necessary for dredging (S. Tr. at 49-50).

II. ARGUMENT

C. The Plaintiff is Not Entitled to Recover Under the Longshore and Harbor Workers' Compensation Act ("LHWCA")

The LHWCA, 33 U.S.C. 905(b), provides in pertinent part that

> in the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel.

Although Jones Act and LHWCA actions are mutually exclusive, and the plaintiff would be entitled to proceed under the LHWCA in the absence of a Jones Act case, the facts of this particular case bar LHWCA recovery.

In his amended complaint, the plaintiff has added a count under Section 905(b) authorizing covered employees to sue a vessel as a third party for injury caused by the negligence of the vessel (*Stewart* Amended Complaint,

[1] The deposition transcript of Willard Stewart shall hereinafter be referred to as "S. Tr."

Exhibit "B"). While Dutra may be subject to suit under Section 905(b) in its capacity as "vessel owner," Dutra is immune from tort actions under the LHWCA in its capacity as the plaintiff's employer. *See DiGiovanni v. Traylor Bros., Inc.*" 855 F. Supp. 37 (D.R.I. 1994) (citing *Levens v. Pintail Enters. Inc.*, 943 F.2d 528, 531 (5th Cir. 1991), *cert. denied,* 504 U.S. 940 (1992)). To prevail, the plaintiff must show that any negligence on Dutra's part is attributable to it as vessel owner rather than as Stewart's LHWCA employer. *See id.* Thus, the court must decide whether Dutra's alleged negligence occurred in its vessel capacity (allowing suit to be brought under Section 905(b)) or in its employer capacity (immunizing it from suit).[2]

The nearly identical issue was before the Unites States Court of Appeals for the First Circuit in the case of *Morehead v. Atkinson-Kiewit*, 75 F.3d 736 (1st Cir. 1996).[3] In *Morehead*, the plaintiff was injured when he stepped backwards into an open hatch on one of the barges (*Morehead* Opinion at 4). The evidence showed that the hatch had been left open for several days to allow access to a marine surveyor. (*Id.*) The plaintiff alleged that the vessel

[2] The plaintiff has alleged in his amended complaint negligence of Dutra and unseaworthiness of the Superscoop. Section 905(b) provides in pertinent part: "The liability of the vessel under this subsection shall not be based upon the warranty of the seaworthiness or a breach thereof at the time the injury occurred." Because of this statutory bar to the plaintiff's unseaworthiness claim, the defendant will only address the plaintiff's negligence allegations.

[3] While the *Morehead* opinion has been withdrawn from publication because a rehearing en banc is pending, the court's decision is sound. The slip opinion is attached hereto as Exhibit "C" and will hereinafter be referred to as "Morehead Opinion."

owner was negligent for allowing the hatch to remain open and for failing to warn. (*Id.* at 5).

In deciding under what capacity the barge owner/employer, Atkinson-Kiewit, was negligent, the court followed the reasoning that "a court may have to divide the single defendant into a hypothetical independent employer and independent vessel owner." (*Id.* at 24). The *Morehead* court explained that the plaintiff's burden would not and should not be easy:

> The statutory language and the legislative history of the 1972 and 1984 Amendments plainly evidence Congress' intent that the workers' compensation scheme be the primary remedy for all covered workers, regardless of an employer's commercial practice in regard to vessel ownership. . . . We are not disposed to upset the balance by expanding the liability of employers that act simultaneously as vessel owners.

(*Id.* at 24-25). The court further wrote that "[t]he exception in Section 905(b) for third-party negligence, removed in 1984, explicitly requires a finding of vessel fault." (*Morehead* Opinion at 30).

The *Morehead* court adopted the reasoning of the seminal case of *Scindia Steam Navigation Co. v. De los Santos,* 451 U.S. 156 (1981):

> [O]nce longshore workers came on board and began carrying out their cargo duties under a stevedore's supervision, the vessel itself had no general duty to exercise reasonable care to inspect for unsafe workplace conditions; rather it could rely on the longshore worker's employer to do so.

(*Id.* at 26, quoting *Scindia,* 451 U.S. at 172). Applying the reasoning of *Scindia* to the facts before it, the *Morehead* court concluded that "*Scindia's* principle of limited liability of the vessel sensibly and logically applies, because the employees effectively assumed control of the barge working under [Atkinson-Kiewit] in its capacity as their employer rather than . . . as the charterer (hence owner) of the barge." (*Id.*)

The *Morehead* court rejected the argument that a vessel assumes a greater duty of care when there is no independent employer responsible for workplace conditions. (*Morehead* Opinion at 19). The court cited *Castorina v. Lykes Bros. S.S.,* 758 F.2d 1025 (5th Cir.), *cert. denied,* 474 U.S. 846 (1985). In *Castorina,* a longshore worker exposed to asbestos during cargo operations alleged that his employer-vessel owner knew of the harm of a vessel and failed to make the vessel safe. The court refused to impute any knowledge of this damage by the employer to it as vessel, writing: "To impute this knowledge to a shipowner-employer would be to hold it liable in tort for damages arising from its negligence as stevedore, and effectively to eliminate the exclusivity provisions of Sections 905(a) and (b)." *Id* at 1033.

Therefore, the plaintiff cannot argue that Dutra had knowledge as dredging company/contractor that the hatch was open or unguarded and that the knowledge should be imputed to Dutra as vessel owner.

The plaintiff is expected to argue that the allegedly negligent acts performed by co-workers which led to his accident were performed in furtherance of the vessel or that the work he was performing when injured was in furtherance of the vessel. The *Morehead* court recognized

this competing analysis and rejected it. (*Id* at 29). In *Morehead* the plaintiff argued that the act of leaving the hatch open was to help the vessel and not in furtherance of some construction activity. In response the court wrote:

> One of the essential purposes of the 1972 and 1984 Amendments was to provide employees and employers with a greater degree of certainty as to the coverage in effect. The legislative history of the 1984 Amendment documents this concern:
>
> > [T]he situation in which a worker may be covered at one time, and not covered at another, depending on the nature of the work which the worker is performing at the time of the injury must be avoided since such a result would be enormously destabilizing, and would thus defeat one of the essential purposes of these amendments.
>
> 1984 U.S.C.C.A.N. at 2736-2737. A "functional" interpretation, hinging the type of liability on the nature and purpose of the duties being performed by covered employees at any given time, would increase uncertainty and the frequency of disputes over the scope of coverage.

(*Morehead* Opinion at 31). In referencing the dual capacity of the employee, the *Morehead* court noted that both types of activities – construction and scowmen's work, – assigned to the harbor workers were performed for Atkinson-Kiewit as *employer* and not as vessel owner. (*Id.* at 26). The *Morehead* court emphasized that because the employment contemplated both construction and linehandling, a single, overall classification was most appropriate for determining the types of remedies available. (*Id.* at 31). Thus, rejecting the plaintiff's argument in that case, the *Morehead* court pointed out that "[a]s is typical in the case

of harbor workers . . . the men were expected to lend a hand with supporting maritime chores as well as pursuing their particular construction trade," and therefore, "the barges tended by its carpenters/scowmen were operated within [Atkinson-Kiewit's] control and knowledge qua employer." (*Id.* at 28).

The same holds true in the case at bar. Stewart and his fellow dredge workers' employment contemplated that their duties would also alternate between work for Dutra as employer and for Dutra as vessel owner. Dutra hired harbor workers through the union hall (S. Tr. at 26). The plaintiff and the other employees on the Superscoop were hired to do tasks relating to both dredging and work on the vessels (S. Tr. at 33, 34, 46, 50). The various engines that Stewart was hired to maintain were used for dredging (the engines that ran the crane), dumping (the engines on the scows) and moving the dredge (deck winches). (S. Tr. at 33-35, 46). At the time he was injured, the plaintiff was working on the remote control for the scow engine which allowed easier dumping of the dredged materials. (S. Tr. at 45). He was therefore performing his regular duties as engineer on a dredging operation. Attempts by the plaintiff in *Morehead* to bifurcate his vessel and construction activities were rejected by the court because the workers were hired to perform both. (*See Morehead* Opinion at 18).

Other employees were also performing "employment duties" when the plaintiff was allegedly injured on the scow (S. Tr. at 50, 53), The operator of the crane was maneuvering the bucket while the deckhands/scowmen were tending lines. (S. Tr. at 129-131). Brad Shoffit was the supervisor of the dredging operation and the captain of the superscoop. (S. Tr. at 129-131). All employees were involved in the dredging process. The *Morehead* court

noted that the owner did not employ a separate crew on its barges. (*Morehead* Opinion at 17). The same applies to Dutra in the case at bar.

Thus, the Superscoop and the adjoining scow were operated within Dutra's control and knowledge qua employer. Furthermore, there is no claim or evidence that the alleged negligent conditions are attributable to the errors of separate maritime agents acting specifically for the vessel. (*See Morehead* Opinion at 26-27).

III. CONCLUSION

Wherefore, the defendant, Dutra Construction Co., Inc., respectfully requests that the court grant its Motion for Summary Judgment on all counts of the plaintiff's Amended Complaint.

By its attorneys,

/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.,
BBO #544538
Moujan M. Walkow,
BBO #630658
PEABODY & ARNOLD
50 Rowes Wharf
Boston, MA 02110
617/951-2100

CERTIFICATE OF SERVICE

I, Frederick E. Connelly, Jr., hereby certify that I have this 17 day of October, 1996, served a copy of the foregoing upon the plaintiff by mailing same postage prepaid to:

Gregory L. Nester, Esq.
Marvin I Barish Law Offices, P.C.
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Thomas J. Hunt, Esq.
One Union Street
Boston, MA 02108

/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.

EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CA # 95-11046 (RCL)

WILLARD T. STEWART

Plaintiff

VS.

DUTRA CONSTRUCTION CO., INC.

Defendant

DEPOSITION OF WILLARD T. STEWART, taken pursuant to Notice under the applicable provisions of the Massachusetts Rules of Civil Procedure on behalf of the Defendant, before Joan M. Barry, a Notary Public in and for the Commonwealth of Massachusetts, at the offices of Peabody & Arnold, 50 Rowes Wharf, Boston, Massachusetts, on Tuesday, May 21, 1996, commencing at 11:30 a.m.

NEAL A. SALLOWAY – COURT REPORTERS
FIVE CARDIGAN ROAD
WEST PEABODY, MA 01960
(617) 581-3993 – (508) 535-0313

APPEARANCES:

PEABODY & ARNOLD

(by Frederick E. Connelly, Jr., Esq.)

50 Rowes Wharf

Boston, Massachusetts 02110

On behalf of the Defendant

MARVIN E. BARISH, ESQ.

(by Gregory L. Nester, Esq.)

The Curtis Center

Sixth and Walnut Streets

Suite 801

Philadelphia, Pennsylvania 19106

On behalf of the Plaintiff

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DEPONENT	DIRECT	CROSS
Willard T. Stewart		
By Mr. Connelly	4	

EXHIBITS

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[4] MR. NESTER: I would like him to read and sign. Okay. I'll explain that to him afterwards. We'll waive notary. He doesn't have to do it in front of a notary.

MR. CONNELLY: All objections reserved until the time of trial, except as to form. All motions to strike are reserved. As far as reading and signing, twenty-one days will be enough time once he receives it?

MR. NESTER: Once I receive it, it should be. If that's problematic, I'll let you know.

WILLARD T. STEWART

having been first duly sworn, deposes and testifies as follows:

EXAMINATION

BY MR. CONNELLY:

Q. Mr. Stewart, my name is Frederick Connelly, and I represent the defendant, Dutra Construction Company. I am going to be asking you some questions today

I first want to go over a few groundrules so the proceedings will go a little smoother. You may have discussed some of this with your attorney already. You're going to have to answer each question outloud, okay, and

* * *

[26] Q. Do your hammer toes in any way affect the work you can do?

A. No.

Q. If at any time during the deposition today you think of any other injuries or claims you've made that you didn't think of before, just let me know.

Okay?

A. Sure.

Q. When did you first start working for Dutra?

A. I believe it was December, 1992. November or December. I know it was cold weather.

Q. And you were hired out of the union hall?

A. Yes.

Q. Okay. When had you last worked before you began working at the Boston job?

A. Where did I last work before that?

MR. NESTER: For Dutra or anybody?

Q. Anybody?

A. I worked for – I was off work for like four months before I worked – I worked in Baltimore.

Q. You worked where?

A. In Baltimore, Baltimore area.

Q. And what company was that for?

* * *

[33] there.

Q. Okay, and there was only one dredge on the Super Scoop?

A. Yes.

Q. And that always remained on it as far as you know?

A. Yes.

Q. How much of your time was spent on the Super Scoop during the time you were on the job?

A. I would say 99 and 9/10s.

Q. 99 and 9/10s?

A. Right.

Q. So, just about all your time was on the Super Scoop?

A. Yes.

Q. What engines on the Super Scoop did you have responsibility for?

A. The main engine on the hoist. They had two deck engines. Occasionally, if they had a problem with the boat, I would deal with that. They would ask me to come check it out, but –

Q. What boat is that?

A. The work boat they had.

[34] (Discussion held off the record.)

Q. We were discussing the engines that you are responsible for, three main ones were the main engine to hoist and the two deck engines?

A. Yes.

Q. And you had spent all your time on the Super Scoop working on those?

A. Yes.

Q. Were you the only person or engineer on the Super Scoop?

A. No. There's three engineers. Not at the same time. I mean, shift work.

Q. Okay. During your shifts, were you the only engineer on the Super Scoop?

A. Yes.

Q. Now, I take it none of these engines had anything to do with the movement of the Super Scoop and the water?

A. The deck engines do. They operate, hoist, cables and ankers and so on.

Q. What would these be used for?

A. Moving Super Scoop to do the dredging operation.

[35] Q. Okay.

A. And –

Q. Do they have any other purposes than moving the Super Scoop?

A. No.

Q. And those would be used how – Would it be by ankers?

A. Yes, ankers and the cables.

Q. And did it have any other form of propulsion other than that?

A. No.

Q. It didn't have a propeller, no.

Q. And how many times during a day would it move? Let me rephrase that.

How many times during a shift would it move?

A. I don't know. Say working a twelve-hour shift, maybe, mostly I guess the work, I would guess six times.

Q. And how far would it be moved?

A. On each move, thirty feet, fifty feet.

Q. How long would each move take?

A. Normally, just a few minutes, maybe five minutes.

* * *

[45] So, I went over to see what I could do to help the Caterpillar man finish up and get the show on the road.

He was finishing up with the engine. So, I decided, I disconnected the wiring the day before. So, I fed the wires back down there and connected the wires back up for the remote control for the lights and so on and on that little building on that thing, and while I was doing this, I was on my knees feeding the wire down through, and they

decided to move the scow around to the other side of the dredge to start filling it up and apparently, I could pretty much nearly drop the bucket in there, swing it around and everything went flying and when it snapped, I don't know what happened, and when I slipped, that's when it all happened.

Q. We'll break it down to make it a little clearer.

Starting with the – Was the engine on the scow that needed replacing?

A. Yes.

Q. They were going to replace the entire engine?

A. The scow 4.

Q. How many scows were being used out there?

[46] A. I think two.

Q. What were the other scow's number?

A. 151 – something like that. 151. I can't remember exactly.

Q. Had you been on the scows at all either shortly before the accident? Had you been on either scow before the day of your –

A. Yes. I check the oil once a week or check the engine.

Q. Now, the scows, do they have self propulsion?

A. No.

Q. They have to be torqued, don't they?

A. Yes.

Q. The engine you're talking about is the hopper?

A. Yes.

Q. Which opens up into the ocean and dumps the dredging material?

A. Yes.

Q. Onto the fish and clams below?

A. Yes.

Q. So, the engine in the scow number 4 blew out or something?

* * *

[50] Q. All right.

A. I wasn't ordered to. It was part of my job when the dredge is shut down to do what it took to get it running again.

Q. Okay. The dredge was shut down. So, you couldn't work.

There was no reason for you to work on the engine of the dredge?

A. Not at that time, no.

Q. So, basically, until this scow gets fixed, you had nothing to do?

MR. NESTER: I'll object to the form of the question.

Q. Let me ask you, did you have any work to do on the Super Scoop until scow number 4 was fixed?

A. I could have. I probably – but not that it was important as getting the scow, to get the dredge back in operation.

Q. Now, was a Caterpillar mechanic there?

A. Yes.

Q. His job was to replace the scow engine?

A. Yes.

Q. Did he have anyone helping him?

[51] A. No, not at that time, no.

Q. What was the first day he was out there?

A. First day.

Q. Was that the first day?

A. I believe the day before, I believe he got there the day before.

Q. Did you check with anyone, any supervisor before you went on to the scow?

A. I talked to the captain, yes.

Q. Who was that?

A. Brad Shoffit.

Q. What did you say to him and what did he say to you?

A. I don't remember.

Q. In any event, you went from the Super Scoop onto the scow?

A. Yes.

Q. And was the scow along side of the Super Scoop at this point?

A. Yes.

Q. Directly along side?

A. Yes.

Q. And how would you get from the Super Scoop to [52] the scow?

A. It was like a, the ladder built right into the side of the – You step off the deck, go off the ladder and onto the scow.

Q. The scow was higher than the Super Scoop?

A. Yes.

Q. Would the scow be tied to Super Scoop?

A. Ropes.

Q. Okay. Several different ropes?

A. Ropes or cables from the winches.

Q. And were there any buffers between the two?

A. Normally, yes. There are tires in there.

Q. Just black tires?

A. Yes.

Q. Hung along side?

A. Yes.

Q. So, you climb aboard the scow?

A. Yes.

Q. Did you have any tools with you?

A. I don't think so.

Q. Okay. And then you, I take it, went to find the Caterpillar mechanic?

A. Yes.

[53] Q. And you were going to say, hey, I'll help you, tell me what to do?

A. Yes, basically, yes.

Q. Did you start working with him before you were injured?

A. I wasn't working with him. He said, he had – He was finishing up with the engine, he was finishing up. I said, well, since you're all right, I'll feed the wires down through and go ahead and wire up the remote control and take care of that. That's something he would have done if I weren't there to help him.

Q. What job was this to hook it up? I don't understand. What are you hooking up?

A. They had a remote control unit. They operated a scow from the tug boat by remote control.

Q. And that was unhooked when he replaced the engine?

A. Yes. They took the top building off of the scow. They took the top building off where the wires are up

through and up through and then there was the control panel down blow.

They disconnected it. So, they could take this building off and disconnected the wiring from the

* * *

[129] A. No.

Q. What people, what crew members were onboard the Super Scoop at the time you were injured. You mentioned Malcolm Oldham?

A. Malcolm Oldham, Bill Duncan, I think, was onboard.

Q. What was he?

A. Pardon me.

Q. What was his job?

A. He was a mate.

Q. Did he ever operate the Super Scoop?

A. I don't think so. I don't know.

Q. Who else was onboard? Was Brad Shoffit onboard?

A. Yes.

Q. He was?

A. Yes. I'm trying to think. Stanley Oldham, I think he was on. I think Roger Hammond. He was a civil engineer. I believe he was on.

Q. Roger Hammond?

A. Yes.

Q. Who would you take orders from?

A. Roger.

[130] Q. Roger would give you orders?

A. No. Who did I take orders from?

Q. Yes.

A. The only one that gave me orders, if anybody, would be Brad Shoffit. He was the captain.

Q. Okay. Any other names of people out –

A. Pardon me.

Q. Can you recall names of any other people working out there?

A. I think Stanley Oldham, I think, was working. I am bad at remembering names. You'll have to ask me.

Q. Okay. In the six or seven months you had been working on the Super Scoop before the day of your accident, how many times had you seen a scow being brought along side the Super Scoop, a couple of times a week or –

A. Oh, yes, early in the job, it was a couple of times a day.

Q. Were they all brought in the same way by putting the bucket in the scow?

A. No. They brought them in with a tug boat sometimes and push. Once, occasionally, they put the bucket in to, you know, bring it in a little closer to hold it until they

got it tied up mostly was what they [131] used the bucket for.

Q. Okay. When you went from the Super Scoop onto the scow, it was tied up.

Is that right?

A. Yes.

Q. So, it had to be untied by the deck hands?

A. Yes.

Q. And then the bucket would have pushed it away and brought it around?

A. Yes.

Q. And you didn't realize any of that was going on?

A. No.

Q. And just, I believe I asked you this, just so I'm clear, the engine that was being worked on on the scow was the engine used to open the hoppers?

A. Yes.

Q. It wasn't to propel the scow?

A. No.

Q. You never slept on the Super Scoop. Is that right?

A. Pardon me.

Q. There was no place for you to sleep on the

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WILLARD T. STEWART, Plaintiff	)
V.	) CIVIL ACTION) NO. 95-11046 (RCL)
DUTRA CONSTRUCTION CO., INC., Defendant.	)

ANSWER OF DUTRA CONSTRUCTION CO., INC. TO PLAINTIFF'S AMENDED COMPLAINT

(Filed Dec. 3, 1996)

Now comes the Defendant, Dutra Construction Co., Inc., by and through its attorneys, Peabody & Arnold, and herewith gives its answer to the plaintiff's complaint, reserving all rights to seek additional defenses to the complaint by appropriate motion.

All allegations not specifically admitted herein are denied. The defendant, Dutra Construction Co., Inc., (hereinafter "Dutra") answers each numbered paragraph as follows:

First Cause of Action

1. The defendant denies the allegations contained in paragraph one.

2. The defendant denies that the plaintiff has standing or is entitled to bring an action under the Jones Act, 46 U.S.C. §688 *et seq* or under the General Maritime Laws of the United States District Court.

3. The defendant denies the allegations contained in paragraph three.

4. The defendant admits that it employed the plaintiff but denies that he was the member of a crew. The defendant denies the remaining allegations of paragraph four.

5. The defendant denies the allegations contained in paragraph five.

6. The defendant denies the allegations contained in paragraph six.

7. The defendant denies the allegations contained in paragraph seven.

Wherefore, the defendant demands that the plaintiff's complaint against it be dismissed and that judgment enter for the defendant, together with its costs.

Second Cause of Action

The defendant denies that the plaintiff is entitled to maintenance and cure and wages and further answers as follows:

8. The defendant incorporates herein by reference its answers to paragraphs 1-7 and makes that its answer to paragraph eight.

9. The defendant denies the allegations contained in paragraph nine.

10. The defendant is unable to admit or deny the allegations of jurisdiction and calls upon the plaintiff to prove same. The defendant denies that the plaintiff has standing or is entitled to bring an action under the Jones Act (46 (USC §688 et seq) or under the General Maritime Laws of the United States District Court.

Wherefore, the defendant demands that the plaintiffs complaint against it be dismissed and that judgment enter for the defendant, together with its costs.

Third Cause of Action

11. The defendant incorporates herein by reference its answers to paragraphs 1-10 and makes that its answer to paragraph 11.

12. The defendant denies the allegations contained in paragraph twelve.

13. The defendant denies the allegations contained in paragraph thirteen.

(a) The defendant denies the allegations contained in paragraph thirteen (a).

(b) The defendant denies the allegations contained in paragraph thirteen (b).

(c) The defendant denies the allegations contained in paragraph thirteen (c).

(d) The defendant denies the allegations contained in paragraph thirteen (d).

(e) The defendant denies the allegations contained in paragraph thirteen (e).

(f) The defendant denies the allegations contained in paragraph thirteen (f).

(g) The defendant denies the allegations contained in paragraph thirteen (g).

(h) The defendant denies the allegations contained in paragraph thirteen (h).

(i) The defendant denies the allegations contained in paragraph thirteen (i).

(j) The defendant denies the allegations contained in paragraph thirteen (j).

(k) The defendant denies the allegations contained in paragraph thirteen (k).

(l) The defendant denies the allegations contained in paragraph thirteen (l).

(m) The defendant denies the allegations contained in paragraph thirteen (m).

(n) The defendant denies the allegations contained in paragraph thirteen (n).

14. The defendant denies the allegations contained in paragraph fourteen.

15. The defendant denies the allegations contained in paragraph fifteen.

THE DEFENDANT, DUTRA CONSTRUCTION CO., INC. ASSERTS THE FOLLOWING AFFIRMATIVE DEFENSES

Now comes the defendant and incorporates the following affirmative defense into each and every count contained in its Answer to Plaintiff's complaint as follows:

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that if the plaintiff was injured as alleged, which is specifically denied, those injuries were the sole and proximate cause of actions of third parties for who the defendant is not legally responsible.

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that if the plaintiff was injured as alleged, which is specifically denied, those injuries were the result of an Act of God for which the defendant is not legally responsible.

FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that if the plaintiff was injured as alleged, which is specifically denied, it was due in whole or in part to the plaintiff's own negligence and failure to exercise his duty of care, skill, and knowledge in the performance of his work reasonably to be required of a person of the plaintiff's experience and not due to any negligence or fault on the part of the defendant or any persons for whom the defendant may be legally responsible.

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that if the plaintiff was injured as alleged, which is specifically denied, such injury was without fault, knowledge or privity of the defendant, that the damages claimed herein exceed the value of the vessel, including her pending freight; and the defendant herewith claims benefits of any and all laws and statutes of Liability of the defendant, including 46 U.S.C. Section 183(b).

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that if the injury alleged was sustained, they did not occur while the plaintiff was in the service of the vessel.

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that the plaintiff breached his contractual duties to the

vessel owner and, therefore, cannot recover under the Walker Doctrine.

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that the Dredge Superscoup and Scow No. 4 is not a vessel as that term is used in the Jones Act, 46 U.S.C. Section 688 et seq, General Maritime Law, or any other applicable statute, both state and federal, and, therefore, plaintiff is not entitled to recover.

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that the plaintiff is not entitled to a trial by jury.

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant states that it did not own the "vessel" as alleged. As a result the plaintiff lacks jurisdiction under either the Merchant Marine Act or the general maritime law to pursue this case of action.

AND FURTHER ANSWERING, AND AS A. COMPLETE AND SEPARATE DEFENSE, the defendant says that the plaintiff is barred from bringing a civil claim because he received payments as a result of a workers compensation claim or similar claim.

AND FURTHER ANSWERING, AND AS A COMPLETE AND SEPARATE DEFENSE, the defendant says that if it was negligent it was negligent in its capacity as employer and not as vessel owner, thus barring the plaintiff's claim brought pursuant to Section 905(b) of the Longshore & Harbor Workers Compensation Act.

WHEREFORE, the defendant demands that the plaintiffs complaint against it be dismissed and that judgment enter for the defendant, together with its costs.

JURY CLAIM

The defendant demands a trial by jury for all applicable Counts.

By its attorneys,

/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.,
BBO #544538
PEABODY & ARNOLD
50 Rowes Wharf
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617/951-2100

CERTIFICATE OF SERVICE

I, Frederick E. Connelly, Jr., hereby certify that I have this 2 day of December, 1996, served a copy of the foregoing upon the plaintiff by mailing same postage prepaid to:

Gregory L. Nester, Esq.
Marvin I Barish Law Offices, P.C.
Suite 801 – The Curtis Center
Independence Mall West
Sixth and Walnut Streets
Philadelphia, PA 19106

Thomas J. Hunt, Esq.
One Union Street
Boston, MA 02108

/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM P. KROMHOUT, Plaintiff	)	
v.	)	C.A. NO. 95-12311-NG
DUTRA CONSTRUCTION COMPANY, INC., Defendant	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S REQUEST FOR ADMISSIONS

(Filed Oct. 6, 1999)

REQUEST NO. 1

On December 14, 1992, the defendant, Dutra, owned, operated, and controlled the BARGE SUPER SCOOP.

RESPONSE NO. 1

Objection on the grounds that the term "controlled" calls for a legal determination which the defendant is not qualified to make. Without waiving this objection and subject to it, the defendant states that on December 14, 1992 it owned and operated the Superscoop.

REQUEST NO. 2

On December, 14, 1992, the SUPER SCOOP was located in Boston Harbor on navigable waters of the United States and was engaged in the dredging operations referred to as "Third Harbor Tunnel."

RESPONSE NO. 2

The defendant admits that on December 14, 1992 the Superscoop was located in Boston Harbor and was engaged in the dredging operation referred to as "Third Harbor Tunnel."

REQUEST NO. 3

The defendant admits that construction of the Superscoop was completed in approximately June, 1976.

RESPONSE NO. 3

The defendant admits the allegations contained in Request No. 3.

REQUEST NO. 4

The SUPER SCOOP was formerly operating on the west coast of the United States and sailed through the Panama Canal under tow to the Boston area to participate in the dredging operation for the Third Harbor Tunnel.

RESPONSE NO. 4

The defendant admits the allegations contained in Request No. 4.

REQUEST NO.5

Movement of the SUPER SCOOP was a necessary part of the dredging operation and was done by the use of the 4 anchors and this was a daily operation.

RESPONSE NO. 5

The defendant admits that on most days during the time that the Superscoop was performing dredging it would be moved a short distance by use of its anchors.

REQUEST NO. 6

The SUPER SCOOP had a raked bow.

RESPONSE NO. 6

The defendant denies that the Superscoop has a standard raked bow.

REQUEST NO. 7

The SUPER SCOOP was A.B.S. qualified.

RESPONSE NO. 7

The defendant admits the allegations contained in Request No. 7.

REQUEST NO. 8

The SUPER SCOOP had load line markings under American Bureau of Shipping Certificate No. 61-29, 944 and had inspection periodically.

RESPONSE NO. 8

The defendant admits the allegations contained in Request No. 8.

REQUEST NO. 9

The SUPER SCOOP was a documented vessel.

RESPONSE NO. 9

The defendant admits the allegations contained in Request No. 9.

REQUEST NO. 10

The SUPER SCOOP was Coast Guard inspected.

RESPONSE NO. 10

The defendant admits the allegations contained in Request No. 10.

REQUEST NO. 11

The SUPER SCOOP had navigation lights.

RESPONSE NO. 11

The defendant admits the allegations contained in Request No. 11.

REQUEST NO. 12

The SUPER SCOOP had deck engines.

RESPONSE NO. 12

The defendant admits that the Superscoop had deck engines but denies that the engines were for propulsion other than the short distances the Superscoop would be moved by its anchors.

REQUEST NO. 13

The SUPER SCOOP's purpose is for dredging operations.

RESPONSE NO. 13

The defendant admits the allegations contained in Request No. 13.

REQUEST NO. 14

The SUPER SCOOP mission was to dredge for the Third Harbor Tunnel.

RESPONSE NO. 14

The defendant admits the allegations contained in Request No. 14.

REQUEST NO. 15

The SUPER SCOOP had ballast tanks to maintain a seaworthy trim.

RESPONSE NO. 15

The defendant admits that the Superscoop had ballast tanks.

REQUEST NO. 16

The SUPER SCOOP had a head and an area for the crew to eat in.

RESPONSE NO. 16

The defendant admits the allegations contained in Request No. 16.

REQUEST NO. 17

Brad Shoffit was the captain of the SUPER SCOOP.

RESPONSE NO. 17

The defendant admits that Brad Shoffit was the person in charge of all employees on the Superscoop and was at times referred to as "Captain."

REQUEST NO. 18

Brad Shoffit hired and fired the members of the crew.

RESPONSE NO. 18

The defendant admits that Brad Shoffit was one of several employees of Dutra who had the authority to hire and fire employees working on the Superscoop.

REQUEST NO. 19

Crewmembers were required to wear life jackets.

RESPONSE NO. 19

The defendant admits that persons working on the Superscoop were required to wear life jackets.

REQUEST NO. 20

Crewmembers were transported to and from the SUPER SCOOP by a crew boat.

RESPONSE NO. 20

The defendant admits the persons working on the Superscoop were transferred to the Superscoop by boat.

REQUEST NO. 21

Captain Brad Shoffit considered Bill Kromhout to be a member of the crew of the SUPER SCOOP.

RESPONSE NO. 21

The defendant admits that at times the employees working on the Superscoop, including engineer Bill Kromhout, were referred to as members of a crew.

REQUEST NO. 22

Captain Brad Shoffit specifically asked to hire Malcolm Oldham as the operator.

RESPONSE NO. 22

The defendant admits that Malcolm Oldham was already employed on the Superscoop and was filling in on a regular basis as an operator. When a position for a full time operator became available, Brad Shoffit asked the union representative whether or not Malcolm Oldham could fill that position.

REQUEST NO. 23

Greasing the upper sheaves can be done externally of the housing but greasing the lower sheaves requires that you must get within the confines of the housing.

RESPONSE NO. 23

Objection on the grounds that the request is confusing, overly broad and subject to varying interpretations. There are many sheaves located upon the Superscoop.

REQUEST NO. 24

The lattice work does not prevent a person's body from entering the area where the plates go up and down.

RESPONSE NO. 24

Objection on the grounds that the request is confusing, overly broad and subject to varying interpretations.

REQUEST NO. 25

In order to grease the sheaves on the tag line tower, you grease from one side and then go to the other side of the tag line towers and grease from that side.

RESPONSE NO. 25

The defendant admits that this is usually the procedure followed by the engineer.

REQUEST NO. 26

Captain Shoffit believed that an operator must have good hearing and remembered that Malcolm Oldham had a hearing aide on December 14, 1992.

RESPONSE NO. 26

The defendant admits that Brad Shoffit testified at his deposition that in his opinion Malcolm Oldham was wearing a hearing aide on December 14, 1992. Brad Shoffit also testified that many persons working on a dredge because of the loud noise have imperfect hearing.

REQUEST NO. 27

Malcolm Oldham did not get a hearing aide until after this incident occurred.

RESPONSE NO. 27

The defendant is not able to admit or deny due to insufficient information at this time and will supplement after additional investigation and discovery.

REQUEST NO. 28

It is not noisy in the operator's cabin.

RESPONSE NO. 28

Objection on the grounds that the request is confusing and subject to varying interpretations. Specifically, what is noisy to one person is not noisy to another.

REQUEST NO. 29

Captain Shoffit was by himself at the Massachusetts General Hospital when he saw and talked to the plaintiff.

RESPONSE NO. 29

The defendant denies the allegations contained in Request No. 29.

REQUEST NO. 30

Malcolm Oldham told Captain Shoffit that Kromhout was trying to get the hose off when the injury occurred.

RESPONSE NO. 30

The defendant admits that Malcolm Oldham told Brad Shoffit that as far as he was aware Mr. Kromhout was trying to free his hose when the injury occurred and that Malcolm Oldham was not aware that Mr. Kromhout was performing greasing operations on the tag line counterweights until after the accident.

REQUEST NO. 31

Since there was no "lockout-tagout" in place on December 12, 1992 to perform the greasing of sheaves operation, the method to perform the greasing operation was through oral communication.

RESPONSE NO. 31

The defendant denies the allegations contained in Request No. 31.

REQUEST NO. 32

When greasing the counterweights, the upper sheaves can be greased from the outside because the grease fittings are accessible from outside the tower.

RESPONSE NO. 32

The defendant admits the allegations contained in Request No. 32.

REQUEST NO. 33

When greasing the counterweight, the lower sheaves can only be greased from the inside the tower.

RESPONSE NO. 33

The defendant admits that the proper procedure to grease the lower sheaves of the tag line counterweight was to make certain that the bucket was on deck before beginning greasing. At that time it was safe to place one's hands through the tower which housed the tag line counterweight.

REQUEST NO. 34

On December 14, 1992, the battery box was located farthest away from the operator on the side of the tower in which the counterweights go up and down.

RESPONSE NO. 34

The defendant admits the allegations contained in Request No. 34.

REQUEST NO. 35

At some time after December 14, 1992, the battery box was moved to its present location.

RESPONSE NO. 35

The defendant has insufficient knowledge upon which to base his response and will supplement this answer after further investigation and discovery.

REQUEST NO. 36

Mark Korkowski, while acting as an agent of Dutra Construction Company, Inc., signed and delivered APPLICATION FOR INSPECTION OF U.S. VESSEL (See Exhibit 1).

RESPONSE NO. 36

Although the defendant believes that Request No. 36 is an accurate statement, it is not able to admit or deny since no Exhibit 1 was attached to the Plaintiff's Request For Admissions.

REQUEST NO. 37

Dutra Construction Company, Inc. and SUPER SCOOP were under the jurisdiction of OSHA as of December 14, 1992.

RESPONSE NO. 37

Objection on the grounds that this request requires the defendant to make a legal conclusion which it is not qualified to make. Further, this is an issue to be decided by the fact finder at trial.

REQUEST NO. 38

The crane aboard the SUPER SCOOP has been an integral part of the barge since it was affixed.

RESPONSE NO. 38

The defendant admits the allegations contained in Request No. 38.

REQUEST NO. 39

Movement of the SUPER SCOOP was done by deck members and was done during the dredging operation as a necessary part of the dredging operation.

RESPONSE NO. 39

The defendant admits that the Superscoop would be moved a short distance by use of its anchors and deck engines during the dredging operation.

KENNETH W. SMITH, HEREBY CERTIFIES THE FOLLOWING: I AM GENERAL COUNSEL FOR DUTRA CONSTRUCTION COMPANY, INC., A DEFENDANT IN THE ABOVE-ENTITLED ACTION AND I SIGN THE FOREGOING RESPONSES TO REQUEST FOR ADMISSION FOR AND ON BEHALF OF THE SAID DEFENDANT AND AM DULY AUTHORIZED TO DO SO.

THE MATTERS STATED WITHIN THE FOREGOING RESPONSES TO REQUEST FOR ADMISSION ARE NOT WITHIN MY PERSONAL KNOWLEDGE AND I AM INFORMED THAT THERE IS NO SINGLE OFFICIAL OF DUTRA CONSTRUCTION COMPANY, INC. WITH PERSONAL KNOWLEDGE OF ALL SUCH MATTERS AND THAT THE MATTERS STATED IN THE FOREGOING RESPONSES TO REQUEST FOR ADMISSION HAVE BEEN ASSEMBLED BY REPRESENTATIVES OF THE DEFENDANT.

I AM INFORMED BY SAID REPRESENTATIVES THAT THE MATTERS SET FORTH IN THE AFORESAID RESPONSES TO REQUEST FOR ADMISSION ARE IN ACCORDANCE WITH THE INFORMATION POSSESSED BY THE DEFENDANT AND ARE TRUE RESPONSES AS FAR AS IT IS POSSIBLE TO VERIFY THEM.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 24th DAY OF JUNE, 1998.

DUTRA CONSTRUCTION
COMPANY, INC.

/s/ Kenneth W. Smith
By: Kenneth W. Smith,
General Counsel
Dutra Construction
Company, Inc.

AS TO OBJECTIONS:

/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.,
BBO # 544538
PEABODY & ARNOLD
50 Rowes Wharf
Boston, MA 02110
617/951-2100

CERTIFICATE OF SERVICE

I Frederick E. Connelly, Jr., hereby certify that I have this 25 day of June, 1998, served a copy of the foregoing upon the plaintiff by mailing same postage prepaid to:

David P. Kaplan, Esq.
The Kaplan/Bond Group
Boston Fish Pier
West Building, Suite 304
P.O. Box 1404
Boston, MA 02205-1404

/s/ Frederick E. Connelly, Jr.
Frederick E. Connelly, Jr.

UNITED STATES COAST GUARD CERTIFICATES OF INSPECTION FOR SUPER SCOOP (ORIGINALLY ATTACHED AS EXHIBIT D TO PLAINTIFF'S MOTION FOR REHEARING)

WILLARD T. STEWART
V.
DUTRA CONSTRUCTION CO., INC. CIVIL ACTION NO. 95-11046-RCL
(D.MASS. FILED: OCTOBER 6, 1999)

CERTIFICATION DATE: 10JAN94

EXPIRATION DATE: 10JAN96

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

[SEAL] **Certificate of Inspection**

VESSEL NAME SUPER SCOOP	OFFICIAL NUMBER D574373
CALL SIGN	SERVICE INDUSTRIAL VESSEL
HOME PORT SAN FRANCISCO, CA	HULL MATERIAL STEEL
HORSEPOWER	PROPULSION
PLACE BUILT MERMENTAU, LA	DATE BUILT 01JAN76
GROSS TONS 1290	NET TONS 1290
DWT	LENGTH 176.00
OWNER DUTRA CONSTRUCTION CO INC	OPERATOR DUTRA CONSTRUCTION CO INC

1000 POINT SAN PEDRO RD
SAN RAFAEL, CA 94901

1000 POINT SAN PEDRO RD
SAN RAFAEL, CA 94901

THIS VESSEL MUST BE MANNED WITH THE FOLLOWING LICENSED AND UNLICENSED PERSONNEL INCLUDED IN WHICH THERE MUST BE 0 CERTIFICATED LIFEBOATMEN AND 0 CERTIFICATED TANKERMAN.

___ MASTER
___ CHIEFMATE
___ 2ND MATE
___ MATES
___ ABLE SEAMEN
___ ORDINARY SEAMEN
___ DECKHANDS
___ _____
___ FIREMEN-WATERTENDERS
___ OILERS
___ _____

___ MASTER & 1ST CLASS PILOT
___ CLASS PILOT
___ RADIO OFFICER(S)
___ OPERATOR(S)
___ CHIEF ENGINEER
___ 1ST ASST.ENGINEER
___ 2ND ASST. ENGINEER
___ ENG'RS.

IN ADDITION, THIS VESSEL MAY CARRY 0 PASSENGERS, 0 OTHER PERSONS IN CREW, 0 PERSONS IN ADDITION TO CREW, AND NO OTHERS. TOTAL PERSONS ALLOWED: 0

ROUTE PERMITTED AND CONDITIONS OF OPERATION:

–OCEANS–

UNMANNED.

****

–RIVERS–

VESSEL MAY CARRY UP TO 10 INDUSTRIAL PERSONNEL WHEN OPERATING ON PROTECTED WATERS. ALL PERSONS SHALL WEAR COAST GUARD APPROVED PERSONAL FLOATATION DEVICES WHILE ON DECK.

WHILE VESSEL IS MANNED A RESCUE VESSEL (M/V HUMMINGBIRD) SHALL BE STANDING BY

****

NO MORE THAN 466 SHORT TONS OF DECK CARGO MAY BE CARRIED. THE VERTICAL CENTER OF GRAVITY OF THIS DECK CARGO MUST NOT EXCEED SIX FEET ABOVE THE DECK. CARGO MUST BE POSITIVELY SECURED AGAINST SHIFTING BEFORE LEAVING PROTECTED WATERS.

***SEE NEXT PAGE FOR ADDITIONAL CERTIFICATE INFORMATION ***

WITH THE INSPECTION HAVING BEEN COMPLETED AT CAPE CANAVERAL, FLORIDA

CERTIFIED BY THE OFFICER IN CHARGE MARINE INSPECTION, JACKSONVILLE, FL

WITH THE APPLICABLE VESSEL, INSPECTION LAWS AND THE RULES AND REGULATIONS PRESCRIBED THEREUNDER.

ON 10JAN90 THIS VESSEL IS TO BE IN ALL RESPECTS IN CONFORMITY

PERIODIC REINSPECTIONS

DATE	ZONE	SIGNATURE

THIS CERTIFICATE ISSUED BY:
A. REGALBUTO, CAPTAIN, USCG

OFFICER IN CHARGE, MARINE INSPECTION
JACKSONVILLE, FL
INSPECTION ZONE

–HULL EXAMS–

–EXAM TYPE–	–NEXT EXAM–
DRYDOCK	31JAN95
INTERNAL STRUCTURAL	31DEC94
–LAST EXAM–	**–PRIOR EXAM–**
26APR93	08JAN90
18DEC91	08JAN90

–STABILITY–

LETTER APPROVAL DATE/22DEC87 OFFICE/GMSC

–INSPECTION STATUS–

PRESSURE VESSELS

TYPE	LOCATION	LAST	NEXT
AIR RECEIVER	CRANE MACH SPAC	10JAN94	10JAN96
AIR RECEIVER	MAIN DECK COMP	10JAN94	10JAN96

–LIFESAVING EQUIPMENT–

	NUMBER PERSONS
TOTAL EQUIPMENT FOR LIFEBOATS (TOTAL)...	10
LIFEBOATS (PORT)*	
LIFEBOATS (STARBD)*	
MOTOR LIFEBOATS*	
LIFEBOATS W/RADIO*	
RESCUE BOATS/PLATFORMS	1
INFLATABLE RAFTS	
LIFE FLOATS/BOUYANT APP WORKBOATS (NOT REQUIRED)	

	REQUIRED
LIFE PRESERVERS (ADULT)	10
LIFE PRESERVERS (CHILD)	
RING BUOYS (TOTAL)	2
WITH LIGHTS*	2
WITH LINE ATTACHED*	2
OTHER*	
IMMERSION SUITS	
PORTABLE LIFEBOAT RADIOS	
EQUIPPED WITH EPIRB?	NO

(*INCLUDED IN TOTALS)

–FIRE FIGHTING EQUIPMENT–

FIXED EXTINGUISHING SYSTEMS

SPACE PROTECTED	AGENT	CAPACITY
FUEL TRANSFER ROOM/ MAIN DECK	CO2	50

FIRE EXTINGUISHERS – HAND PORTABLE AND SEMI-PORTABLE

A-II	B-I	6 B-II	B-III
B-IV	B-V	C-I	C-II

END

Department of Transportation
United States Coast Guard
Washington, D.C. 20593-0001

[SEAL] [SEAL]

CERTIFICATE OF FINANCIAL RESPONSIBILITY (WATER POLLUTION)

KNOW ALL PERSONS BY THESE PRESENTS THAT ___ No. 830 416-07 Vessel Operator DUTRA CONSTRUCTION CO., INC. has established financial responsibility to meet liability under section 311(p) of the Federal Water Pollution Control Act, as amended, which may result from the operation of the vessel named below:

Name of Vessel

SUPER SCOOP Expires FEB 20, 1995

The use of this certificate is subject to the provisions of Part 130 of Title 33 of the Code of Federal Regulations, as it is or may be amended, and the conditions on the reverse of this Certificate. This Certificate is void if there are any erasures or alterations hereon, and is void if the operator named hereon is not the party responsible for operating the vessel.

/s/ Robert M. Skall
Assistant Chief, Marine
Environmental Response
Division
Office of Marine Safety,
Security and
Environmental Protection
By Direction of the Commandant,
U.S. Coast Guard

United States of America
Department of Transportation
United States Coast Guard

[SEAL] TEMPORARY CERTIFICATE OF INSPECTION

This Temporary Certificate of Inspection is issued under the provisions of Title 46 United States Code Section 3309 in lieu of the regular certificate of inspection, and shall be in force only until the receipt or board said vessel of the original certificate of inspection, this certificate in no case to be valid after one year from the date of inspection.

VESSEL	OFFICIAL NUMBER
SUPER SCOOP	D574 373

CLASS	GROSS TONS	HOMEPORT
INDUSTRIAL VESSEL	1290	SAN FRANCISCO, CA

OWNER/ADDRESS	OPERATOR/ADDRESS
DUTRA CONSTRUCTION COMPANY INC.	DUTRA CONSTRUCTION COMPANY INC.
2199 CLEMENT AVENUE	2199 CLEMENT AVENUE
ALAMEDA, CA. 94501	ALAMEDA, CA. 94501

The following complement of licensed officers and crew is required to be carried; included in which there must be ___ Certificated Lifeboatmen and ___ Certificated Tankermen:

___	Master	___	Master & 1st Class Pilot
___	Chief Mate	___	Class Pilot
___	2nd Mate	___	Radio Officer
___	Mate(s)	___	Operator(s)
___	Able Seamen	___	Chief Engineer
___	Ordinary Seamen	___	1st Asst. Engineer
___	Deckhands	___	2nd Asst. Engineer
___	_____	___	___ Engineer(s).

___ Firemen-Watertenders
___ Oilers
___ _____

In addition, this vessel may carry ___ other persons in crew, ___ passengers, ___ persons in addition to the crew, and ___. Total persons allowed 0.

Maximum steam pressure allowed N/A p.s.i.

DATE DAY DOCK NO. 26APR98

ROUTE PERMITTED AND CONDITIONS OF OPERATION

–OCEANS–

UNMANNED

–RIVERS–

VESSEL MAY CARRY UP TO TEN (10) INDUSTRIAL PERSONNEL WHEN OPERATING ON PROTECTED WATERS ALL PERSONNEL SHALL WEAR COAST GUARD APPROVED PERSONNEL FLOATATION DEVICES WHILE ON DECK.

WHILE VESSEL IS MANNED A RESCUE VESSEL (M/V HUMMINGBIRD) SHALL BE STANDING, BYE.

NO MORE THAN 446 SHORT TONS OF DECK CARGO MAY BE CARRIED THE VERTICAL CENTER OF GRAVITY OF THIS CARGO SHALL NOT EXCEED (6) SIX FEET ABOVE THE DECK, CARGO MUST BE POSITIVELY SECURED AGAINST SHIFTING BEFORE LEAVING PROTECTED WATER.

Inspection of the above vessel, was completed on 10 JANUARY 1994 DH I, HEREBY CERTIFY that on this date the vessel was in all respects in conformity with applicable vessel inspection laws and regulations prescribed thereunder.

OFFICER IN CHARGE MARINE INSPECTION
A. REGALBUTO, CAPTAIN, USCG

INSPECTION ZONE
JACKSONVILLE, FLORIDA

_____

CERTIFICATION DATE: 12DEC91

EXPIRATION DATE: 12DEC93

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

[SEAL] **Certificate of Inspection**

VESSEL NAME SUPER SCOOP	OFFICIAL NUMBER D574373
CALL SIGN	SERVICE INDUSTRIAL VESSEL
HOME PORT SAN FRANCISCO, CA	HULL MATERIAL STEEL
HORSEPOWER	PROPULSION
PLACE BUILT MERMENTAU, LA	DATE BUILT 01JAN76
GROSS TONS 1290	NET TONS 1290
DWT	LENGTH 176.00

OWNER
DUTRA CONSTRUCTION CO INC
2199 CLEMENT AVENUE
ALAMEDA, CA 94501

OPERATOR
DUTRA CONSTRUCTION CO INC
2199 CLEMENT AVENUE
ALAMEDA, CA 94501

THIS VESSEL MUST BE MANNED WITH THE FOLLOWING LICENSED AND UNLICENSED PERSONNEL INCLUDED IN WHICH THERE MUST BE Q CERTIFICATED LIFEBOATMEN AND Q CERTIFICATED TANKERMAN.

___ MASTER
___ CHIEFMATE
___ 2ND MATE
___ MATES
___ ABLE SEAMEN
___ ORDINARY SEAMEN
___ DECKHANDS
___ _____
___ FIREMEN-WATERTENDERS
___ OILERS
___ _____

___ MASTER & 1ST CLASS PILOT
___ CLASS PILOT
___ RADIO OFFICER(S)
___ OPERATOR(S)
___ CHIEF ENGINEER
___ 1ST ASST. ENGINEER
___ 2ND ASST. ENGINEER
___ ___ ENG'RS.

IN ADDITION, THIS VESSEL MAY CARRY Q PASSENGERS, Q OTHER PERSONS IN CREW, Q PERSONS IN ADDITION TO CREW, AND NO OTHERS. TOTAL PERSONS ALLOWED: Q

ROUTE PERMITTED AND CONDITIONS OF OPERATION:

–OCEANS–

UNMANNED.

****

–RIVERS–

VESSEL MAY CARRY UP TO 10 INDUSTRIAL PERSONNEL WHEN OPERATING ON PROTECTED WATERS. IN BOSTON HARBOR BETWEEN EAST BOSTON AND SOUTH BOSTON UNDER REASONABLE OPERATING CONDITIONS. ALL PERSONS SHALL WEAR COAST GUARD APPROVED PERSONAL FLOATATION DEVICES WHILE ON DECK.

WHILE VESSEL IS MANNED A RESCUE VESSEL (M/V CASTINE) SHALL BE STANDING BY.

****

NO MORE THAN 466 SHORT TONS OF DECK CARGO MAY BE CARRIED. THE VERTICAL CENTER OF GRAVITY OF THIS DECK CARGO MUST NOT EXCEED SIX FEET ABOVE THE DECK. CARGO MUST BE POSITIVELY SECURED AGAINST SHIFTING BEFORE LEAVING PROTECTED WATERS.

***SEE NEXT PAGE FOR ADDITIONAL CERTIFICATE INFORMATION ***

WITH THE INSPECTION HAVING BEEN COMPLETED AT BOSTON, MASSACHUSETTS

CERTIFIED BY THE OFFICER IN CHARGE MARINE INSPECTION, BOSTON, MASSACHUSETTS

WITH THE APPLICABLE VESSEL, INSPECTION LAWS AND THE RULES AND REGULATIONS PRESCRIBED THEREUNDER.

ON 12DEC91 THIS VESSEL IS
TO BE IN ALL RESPECTS IN CONFORMITY

PERIODIC REINSPECTIONS

DATE	ZONE	SIGNATURE

THIS CERTIFICATE ISSUED BY:
/s/ W. H. Boland, Jr.
W. H. BOLAND, JR. CAPTAIN, USCG

OFFICER IN CHARGE, MARINE INSPECTION
BOSTON, MASSACHUSETTS
INSPECTION ZONE

–HULL EXAMS–

–EXAM TYPE–	-NEXT EXAM-
DRYDOCK	31JAN93
INTERNAL STRUCTURAL	31DEC94
–LAST EXAM–	**–PRIOR EXAM–**
08JAN90	29APR87
18DEC91	08JAN90

–STABILITY–

LETTER APPROVAL DATE/22DEC87 OFFICE/GMSC

–INSPECTION STATUS–

PRESSURE VESSELS

TYPE	LOCATION	LAST	NEXT
AIR RECEIVER	MACHINERY SPACE	12DEC91	12DEC93
AIR RECEIVER	PUMP ROOM	12DEC91	12DEC93

–LIFESAVING EQUIPMENT–

	NUMBER PERSONS
TOTAL EQUIPMENT FOR LIFEBOATS (TOTAL)...	10
LIFEBOATS (PORT)*	
LIFEBOATS (STARBD)*	
MOTOR LIFEBOATS*	
LIFEBOATS W/RADIO*	
RESCUE BOATS/PLATFORMS	1
INFLATABLE RAFTS	
LIFE FLOATS/BOUYANT APP WORKBOATS (NOT REQUIRED)	
	REQUIRED
LIFE PRESERVERS (ADULT)	10
LIFE PRESERVERS (CHILD)	
RING BUOYS (TOTAL)	2
WITH LIGHTS*	2
WITH LINE ATTACHED*	2
OTHER*	
IMMERSION SUITS	
PORTABLE LIFEBOAT RADIOS	
EQUIPPED WITH EPIRB?	NO

(*INCLUDED IN TOTALS)

–FIRE FIGHTING EQUIPMENT–

FIRE EXTINGUISHERS – HAND PORTABLE AND SEMI-PORTABLE

A-II	B-I	6 B-II	B-III
B-IV	B-V	C-I	C-II

–CERTIFICATE AMENDMENTS–

PORT AMENDING/BOSMS

DATE AMENDED/07FEB92

–AMENDMENT–

DRYDOCK INTERVAL CHANGED FROM ONCE IN 5 YEARS TO TWICE IN 5 YEARS DUE TO PERMISSIVE MANNING

END

INTERNATIONAL LOAD LINE CERTIFICATE BY THE AMERICAN BUREAU OF SHIPPING FOR THE SUPER SCOOP (ORIGINALLY ATTACHED AS EXHIBIT E TO PLAINTIFF'S MOTION FOR REHEARING)

WILLARD T. STEWART
V.
DUTRA CONSTRUCTION CO., INC.
CIVIL ACTION NO. 95-11046-RCL
(D.MASS. FILED: OCTOBER 6, 1999)

INTERNATIONAL LOAD LINE CERTIFICATE (1966)

Issued under the provisions of the International Convention on Load Lines, 1966, under the authority of the Government of the

[SEAL] UNITED STATES OF AMERICA,
Commandant, U. S. Coast Guard,

by the American Bureau of Shipping
duly authorized for assigning purposes under the provisions of the Convention

7609467-2
Certificate No.

Name of Ship	Official number or Distinctive Letters
SUPER SCOOP	574,373

Port of Registry	Length (L) as defined in Article 2 (8); i.e., 46 CFR 42.13-15
ALAMEDA	168'-11-1/2"

Freeboard assigned as: • (A new ship
• (Delete whatever
(is inapplicable.

Type of Ship • (Type "B" with
(increased freeboard

Freeboard from deck line

Tropical	5	feet	2	inches (T)
Summer	5	feet	3-⅝	inches (S)
Winter	5	feet	5-¼	inches (W)
Winter: North Atlantic	5	feet	7-¼	inches (WNA)

Load Line

1-⅝ inches above (S)
Upper edge of line at level of center of rim
1-⅝ inches below (S)
3-⅝ inches below (S)

Note: Freeboards and load lines which are not applicable need not be entered on the certificate.

Allowance for fresh water for all freeboard 1-⅝ inches.

Note: All measurements are to upper edge of the respective horizontal lines.

The upper edge of the deck line from which these freeboards are measured is OPPOSITE TOP OF STEEL UPPER deck at side.

NOTE:

STABILITY OF THIS VESSEL HAS BEEN CHECKED AND FOUND SATISFACTORY PROVIDED THE RESTRICTIONS SET FORTH IN THE ATTACHED STABILITY LETTER DATED 14 JULY 1977 ARE OBSERVED.

THIS CERTIFICATE IS VALID FOR UNMANNED OPERATION ONLY.

Date of initial or periodical survey 26 FEBRUARY 1981

THIS IS TO CERTIFY that this ship has been surveyed and that the freeboards have been assigned and load lines shown above have been marked in accordance with the International Convention on Load Lines, 1966.

This Certificate is valid until 26 FEBRUARY 1986 **, subject to annual surveys in accordance with Article 14(1)(c) of the Convention, and endorsement thereof on the reverse side of the Certificate.

**At the expiration of this certificate, applicable reissuance should be obtained in accordance with the Load Line Regulations.

[SEAL]

Issued at New York, N.Y. 1 JUNE 1981

The undersigned declares that he is duly authorized by the said Government to issue this Certificate.

/s/ A.M. Crahan
A.M. CRAHAN,
ASSISTANT SECRETARY
American Bureau of Shipping

ANNUAL SURVEYS

THIS IS TO CERTIFY that at an annual survey required by Article 14(1)(c) of the Convention, this ship was found to comply with the relevant provisions of the Convention.

Place _____ Date _____

_____ Surveyor to the American Bureau of Shipping

(Signature)

Place Richmond California Date 31 August 1983

K.Kaufman Surveyor to the American Bureau of Shipping

(Signature)

Place San Diego, CA. Date 3 October 1984

/s/ [Illegible] Surveyor to the American Bureau of Shipping

(Signature)

Place _____ Date _____

_____ Surveyor to the American Bureau of Shipping

(Signature)

EXTENSION OF LOAD LINE CERTIFICATE

The provisions of the Convention being fully complied with by this ship, the validity of this Certificate is, in accordance with Article 19(2) of the Convention, extended until _____

Place _____ Date _____

_____ Surveyor to the American Bureau of Shipping

(*Signature*)

Notes:

1. When a ship departs from a port situated on a river or island waters, deeper loading shall be permitted corresponding to the weight of fuel and all other materials

required for consumption between the point of departure and the sea.

2. When a ship is in fresh water of unit density the appropriate load line may be submerged by the amount of the fresh water allowance. Where the density is other than unity, an allowance shall be made proportional to the difference between 1.025 and the actual density.

3. It is the owner's responsibility to furnish the master wit approved information and instructions for loading and ballasting this vessel to provide guidance as to stability of the vessel under varying conditions of service and to avoid unacceptable stresses in the vessel's structure, as defined in 46 CFR 42.09-1.

4. The Winter North Atlantic Load Line applies only to vessels of 328 ft. in length or less, which enter any part of the North Atlantic Ocean during the winter months as defined by the Load Line Regulations in 46 CFR 42.30-5 and 42.30-35. The periods during which the other seasonal load lines apply in different parts of the world are as stated in the Load Line Regulations of 46 CFR 42.30-5 to 42.30-30, inclusive.

5. This Load Line Certificate will be canceled by the Commandant, U.S. Coast Guard, if –

(a) The annual surveys have not been carried out within three months either way of each anniversary date of the certificate.

(b) The certificate is not endorsed to show that the ship has been surveyed as indicated in (a).

(c) Material alterations have been made to the hull or superstructures such as would necessitate the assignment of an increased freeboard.

(d) The fittings and appliances for the protection of the openings, guardrails, freeing ports, or the means of access to the crew's quarters have not been in as effective a condition as they were when the Certificate was issued.

(e) The structural strength of the ship is lowered to such an extent that the ship is unsafe.

6. When this Certificate has expired or been canceled, it must be delivered to the assigning Authority.

SECTION 148 OF DUTRA CONSTRUCTION CO., INC.'S CONTRACT FOR DREDGING (ORIGINALLY ATTACHED AS EXHIBIT F TO PLAINTIFF'S MOTION FOR REHEARING)

WILLARD T. STEWART

V.

DUTRA CONSTRUCTION CO., INC.
CIVIL ACTION NO. 95-11046-RCL
(D.MASS. FILED: OCTOBER 6, 1999)

SECTION 148

DREDGING

Item No.	Description	Unit
148.01	Dredging (Alt. 1)	CY
148.02	Dredging (Alt. 2)	CY
148.31	Removal and Disposal of Ledge (Alt.1)	CY
148.32	Removal and Disposal of Ledge (Alt.2)	CY

Except as indicated below and on the Plans, all work shall be in accordance with the pertinent requirements of Standard Specifications Section 148, Dredging.

DESCRIPTION

ADD THE FOLLOWING TO SECTION 148.20 GENERAL

148.20 GENERAL

When the nature of the material to be dredged requires blasting, the Contractor's blasting program and methods shall be those necessary to accomplish the dredging shown on the Contract Drawings in accordance with the procedures specified herein. The Contractor will be required to make necessary plans, examinations, surveys, test blasts

to determine the quantity of explosives that can be fired, and thereafter control the quantity of explosives in any one blast.

The foundation course method shall consist of either screeded gravel (Alternate 1) or sand placed by pumping methods (Alternative 2). The two methods require different amounts of dredging.

The Work of this Section also includes furnishing, installing and maintaining geotechnical instrumentation as shown on the plans and collecting, reducing, plotting, interpreting and reporting instrumentation data for both the Contractor installed instrumentation and the instrumentation installed by the Department's Management Consultant prior to award of this Contract.

ADD THE FOLLOWING NEW SECTIONS:

148.26 APPLICABLE PUBLICATIONS

The Contractor shall comply fully with all state, local and federal regulations including, but not limited to, the following regulations and reports:

A. Code of Massachusetts Regulations, 527 CMR: Board of Fire Prevention Regulations.

B. Organized Crime Control Act of 1970, Title XI, Regulation of Explosives (P.L. 91-452).

C. Commerce in Explosives, Part 181 of Title 26, Code of Federal Regulations.

D. Safety and Health Regulations for Construction, Title 29, Labor Chapter XVII, Bureau of Labor Standards, Department of Labor Parts 1910 and 1926.

E. Interstate Commerce Commission Regulations.

F. Applicable U.S. Coast Guard Regulations and state, county, municipal, or port authority codes, rules, regulations and laws.

G. Federal Register, Volume 36, Number 10, 15 January 1971, Department of the Treasury.

H. The Erosion and Sedimentation Control Plan (Exhibit II-C).

I. USDOT Geotechnical Engineering Notebook, Geotechnical Guideline No. 7, Guide Controlled Blasting Specification.

Should two regulations or requirements conflict, the most stringent shall apply.

148.27 MATERIAL TO BE REMOVED

The material to be removed includes hard material. Hard material is defined as material requiring blasting or the use of special equipment for economical removal, and includes boulders or fragments too large to be removed in one piece by the dredge. All such material shall be considered ledge for the purpose of measurement and payment.

148.28 ARTIFICIAL OBSTRUCTIONS

Except as indicated on the Plans, the Department has no knowledge of cables, pipes, or other artificial obstructions or of any wrecks, wreckage, or other material.

Contractor is alerted to the fact that the Subaru area was previously utilized to dock and repair U.S. Naval vessels. It is not known whether munitions were deposited in this area. Contractor is to exercise care when excavating and dredging this area and take necessary precautions to protect its workers and equipment during the progress of the work. Should munitions be discovered by the Contractor, the

situation will be considered a changed condition and will be addressed in accordance with Section 4.03. Contractor shall excavate down approximately 40 feet to original pier depth and conduct investigations prior to continuing the Work. Investigation plan is to be submitted to the Engineer for approval.

148.29 PERMITS

The Contractor shall comply with all conditions and requirements of the Corps of Engineers Permit and other local, state or federal permits. The Department will secure the permit for all dredging. The Department will secure the permit for disposal of material designated for the Massachusetts Bay Disposal Site. The Contractor shall obtain all other permits required by the work.

The Contractor shall be responsible for obtaining all licenses, permits, and approvals, and the keeping of accounts and records, as well as arranging the transportation and protection of all explosives used for the work. Should the Contractor fail to comply with above requirements, the Engineer may order a suspension of that part of work involved until the deficiencies are corrected. The Contractor will not be entitled to additional compensation for suspension of the work due to its own deficiencies.

148.30 SUBMITTALS AND COORDINATION OF WORK

A. The Contractor shall submit to the Engineer for review, detailed information on proposed equipment, methods, and sequence of operations.

B. The Contractor shall prepare a blasting plan. Blasting plan shall include a test blasting plan as described herein. The blasting plan shall include the following:

1. Contractor shall submit a Test Blasting Plan to the Engineer and U.S. Coast Guard for review and acceptance. No blasting shall occur until the Blasting Plan is accepted by the Engineer and the U.S. Coast Guard.
2. The Contractor shall submit a weekly blasting operation schedule to facilitate monitoring of the effects of blasting operations.
3. The Contractor shall hold weekly coordination meetings with adjacent property owners, public agencies, local authorities, and mariners during the dredging and blasting operations.
4. The Contractor shall submit a Blasting Plan which includes, as a minimum:
   a. Proposed method of transportation, storage, and handling of explosives.
   b. Procedure for monitoring the blast operations and handling misfires.
   c. Location, size, depth, maximum charge weight per delay and round and spacing of blast holes, type of explosive and method of loading and detonating, stemming, and maximum number of holes to be detonated per blast. Additionally, type of blasting equipment to be used and when last tested.
   d. Type of instrumentation to be used, manufactured, and when last calibrated and/or certified.
   e. List of licenses, permits and/or clearances required, when applied for, and date of approval or anticipated approval by federal, state, and local concerns.

f. A format for maintaining a record of individual blasts (i.e., the "Daily Blasting Log") throughout the life of the job designed to record pertinent data before, during, and after the blasting operation.

g. Names and qualifications of specialists for vibration control analysis. Names and addresses of all certified blasters and users.

h. Plan showing location and warning signs and signals to be used. Method of controlling vessel traffic and communications.

i. Name and address of Contractor's representative to which any claims for damage due to blasting should be addressed.

j. Prior to commencing the work, the Contractor shall prepare a Test Blast Plan. This Plan shall include the planned test patterns and weights of explosives of each test blast, with anticipated peak particle velocities at structures most likely to be affected from the test blast. The results of the Test Blast Program will determine the allowable Contractor production rates.

k. Sequence of blasting, lifts (if used), direction of advance, description of equipment, schedule, and restricted zones.

l. Location of blast monitoring instruments. Contractor to monitor blast vibrations at all structures located within a 1,000-foot radius of the limits of the work.

m. The requirements of paragraph 148.67. C.1

C. Schedules for blasting shall be thoroughly coordinated with the proper federal, state and local authorities,

General Ship Corporation and the New England Aquarium. No blasting will be done unless approved by the Engineer.

D. The Contractor will be required to obtain all necessary permits from the local authorities to perform blasting operations. The Engineer shall be notified in writing that all permits have been obtained, and shall be furnished with copies prior to commencement of blasting operations.

E. Work in areas adjacent to the ship channel shall be coordinated with the U.S. Coast Guard and the Commonwealth of Massachusetts Port Authority and the Boston Harbormaster.

F. Report of Loss: Should a loss or theft of explosives occur, all circumstances and details shall be immediately reported to the nearest office of the (ATF) Alcohol, Tobacco, Firearms as well as to the local law enforcement authorities and the Engineer.

G. At least 30 days prior to installing each geotechnical instrument, submit to Engineer for approval the type of equipment, planned location, installation schedule and monitoring schedule for that instrument.

H. Within 5 days of installing each geotechnical instrument, submit to Engineer as-built location as specified, and installation record sheet.

I. When readings indicate ground or structure movement the Engineer shall be notified immediately. Within 24 hours of reading an instrument, submit to Engineer raw, reduced and plotted data on all readings.

J. At least 15 days prior to commencement of any dredging work the Contractor shall submit:

1. Manufacturers' product data on all instruments specified herein, including any requests for consideration of substitutions, as specified herein, and warranty provisions.
2. Detailed step-by-step procedures, for all instruments specified herein, for:
   - factory calibration
   - pre-installation acceptance tests
   - installation
   - post-installation acceptance tests
   - protection from damage
   - maintenance of readout units
   - field calibration of readout units
   - maintenance of installed components
   - collection of initial data
   - collection of subsequent data
   - data reduction
   - data processing
   - data plotting
   - data reporting
   - coordination with the Engineer to ensure compatibility of collected data
   - data interpretation

   together with all required field and office forms. The installation procedures shall include lists of tools and materials required, and specifications for

required grout mixes. Field calibration procedures shall include schedules.

K. Within 2 Days of receipt of each instrument at the site, submit to Engineer copy of factory calibration, manufacturer's test equipment certification and completed copy of quality insurance checklist.

L. Within 2 Days of receipt of the first of each instrument type, submit to Engineer the manufacturer's instruction manual for that instrument.

M. Within 14 Days of receipt of each instrument at the site, submit to Engineer result of pre-installation acceptance test.

N. Within 14 Days after award of the Contract, submit to the Engineer for approval resumes of geotechnical engineering specialist(s) sufficient to define details of direct site experience, with names and telephone numbers of individuals who can be contacted for references.

O. Contractor shall submit munitions excavation plan to the Engineer prior to excavating/dredging beyond 40 foot depth.

148.31 ENVIRONMENTAL PROTECTION

The Contractor shall provide, and maintain during the life of the Contract, environmental protective measures. The Contractor shall also provide clean up of oil spills and debris, that occur during the dredging operations and maintenance of the trench in accordance with Section 7.02. The Contractor shall comply with all federal, state, and local regulations pertaining to water, air, and noise pollution and the requirements of these Special Provisions.

The Contractor will provide a fisheries biologist to the Engineer to monitor fish runs and report on any possible

fish kills from the blasting operations during the full duration of the blasting operations. The Contractor shall cooperate with the biologist in observations and collection of any dead fish by providing a boat and operator as needed during blasting operations. No separate payment will be made for use of the boat and operator. All costs associated with this work will be included in the Unit Prices for Payment Items of this Section.

148.32 RESPONSIBILITIES

A. General: The Contractor shall be responsible for the blasting program and methods necessary to accomplish the dredging shown on the Contract Drawings in accordance with the procedures specified herein. The Contractor will be required to make necessary plans, examinations, surveys, and test blasts to determine the quantity of explosives that can be fired without damaging property, and to thereafter control the quantity of explosives fired in any one blast to prevent injuries to persons or damage to structures, homes, utilities, vehicles, vessels moored or underway, or any property.

B. The Contractor shall, in addition, process any and all claims of private citizens arising out of said use of explosives promptly; in particular, all property damage claims shall be acknowledged by the Contractor immediately, and the claimed damage inspected within thirty (30) days following initial notification.

C. Public Meeting: The Contractor shall have specialists qualified in vibration and airblast control available for up to three (3) days if requested to prepare for and participate in a public meeting, conducted by the Engineer to better inform the public about anticipated drilling and blasting operations.

D. Preblast and Postblast Survey: The Contractor shall provide a specialist on vibration control to work with a representative of the Engineer in making a preblast structural survey. All structures located within 1000 ft of the work will be inspected and their condition documented. Any existing outstanding architectural defects, such as broken or fallen plaster or broken windows, shall be photographically documented.

During the blasting phase, the Contractor shall conduct a structural survey of all structures located within 1000 ft of the work and document their condition and any changes thereto. Such post-blast survey shall be conducted on a monthly basis at a minimum.

E. Instrumentation:

The Contractor shall:

1. Furnish components of instrumentation that are to be installed during construction as shown on the plans and specified herein.
2. Furnish portable readout instruments for the Contractor's use.
3. Furnish portable readout instruments for the Engineer's use. This equipment will be returned to the Contractor upon completion of the work.
4. Install, protect from damage, and maintain installed components of instrumentation during construction.
5, Maintain and calibrate portable readout instruments for the Contractor's and Engineer's use.
6. Collect, reduce, process, plot, and report data. These tasks are referred to herein as the Contractor's monitoring program.
7. Provide access to the Engineer for data collection.

8. Coordinate with the Engineer to ensure compatibility of collected data.

9. Interpret data resulting form both the Engineer's and the Contractor's monitoring programs.

10. Implement recommendations developed from interpretations of monitoring program data.

F. Vibration Specialist shall be employed to monitor vibration levels at all buildings located within 1000 ft radius of the work.

148.33 QUALIFICATIONS OF PERSONNEL

A. Personnel:

1. The Contractor shall obtain a blasting permit from the Boston Fire Department. The operator shall exhibit a certificate of competence and evidence of a valid blasting bond.

2. The Contractor shall retain a specialist qualified in vibration control methods who is capable of analyzing results obtained from seismograph readings and who has a minimum of three years of direct field experience monitoring the type of construction specified herein. Specialist shall be subject to the Engineer's acceptance.

3. The Contractor shall provide a geotechnical engineering specialist with five years minimum relevant experience, to furnish and install all geotechnical instrumentation, to maintain and calibrate instrumentation as required, and to collect, reduce, process, plot, interpret and report data to the Engineer. Specialist shall be accepted by the Engineer.

4. The Contractor shall also provide a survey specialist to make survey measurements for vertical and

lateral deformation monitoring. Specialist shall be accepted by the Engineer.

MATERIALS

ADD THE FOLLOWING:

148.34 GEOTECHNICAL INSTRUMENTATION

A. Inclinometer

1. Provide inclinometer probe, cable, pulley assembly, cable hold, and readout unit with overall sensitivity of ±0.0001- foot lateral movement per two feet of casing. A minimum of two probes, cables, pulley assemblies, cable holds and indicators shall be provided for the Contractor's monitoring program, and one of each for the Engineer's monitoring program. The probe shall have two servo accelerometers in waterproof housing. One accelerometer will have sensing axis in the plane of the spring loaded wheels which ride in the casing grooves. The second accelerometer will sense at 90° (π/2 rad) so that the angle of inclination of sensor and casing is measured in the orthaganal direction. Cable should be 125 feet long. Indicator shall be portable, battery powered, microprocessor-based computer, to record, check and reduce data. Permanent storage of the database will be on 3.5-inch disk. Indicator shall be contained in study case with watertight and dustproof construction.

2. Provide inclinometer casing 2.75 in. o.d. ABs plastic with four internal longitudinal grooves, precisely manufactured to fit probes' wheel dimensions. The grooves shall be spaced on the inside circumference of the casing at 90° (π/2 rad) forming symmetrical relationship between successive casing sections.

Couplings shall be low profile slip type with permanent internal alignment key.

Readout unit shall be Digitilt PC as manufactured by Slope Indicator Co. or Inclinometer Data Logger as manufactured by Geo Group, Inc., or acceptable equivalent. The time interval between recordings two feet apart in the casing shall be such that the reading stabilizes to within ±1 unit of display within 8 seconds. Readout unit shall include a battery charger.

Provide one set of inclinometer software, GTILT, as supplied by Mite Software Corporation, Edmonton, Alberta, or acceptable equivalent.

3. Grout mix shall be submitted to the Engineer for acceptance and shall contain cement, bentonite and water.

4. Surface protection shall be flush with the ground surface in paved or other areas. Surface protection shall consist of a minimum 2-foot-long roadway box with a plain, unmarked locking lid. Roadway boxes shall have a diameter adequate to allow attachment of cable support assembly.

Inclinometer installations outside the right-of-way shall not extend above existing grade.

Deformation Monitoring Points

1. Deformation monitoring points (DMPs) will be used to monitor vertical and/or horizontal deformation of various facilities at selected locations shown on the Plans.

2. The following five types of DMPs shall be used to monitor deformation:

   a. DMP-Type 1 shall consist of a 1½-inch PK-nail driven into an asphalt-covered surface.

   b. DMP-Type 2 shall consist of a 1-inch-long by 5/16-inch diameter punchmarked carriage bolt screwed in a 2-inch-long by 5/16-inch diameter tamp-in anchor. These tamp-in anchors shall typically be drilled and epoxied into vertical surfaces of building foundations.

   c. DMP-Type 3 shall consist of a ½-inch-long by 5/16-inch diameter punchmarked carriage bolt screwed into a 1-inch-long by 5/16-inch diameter tamp-in anchor. These tamp-in anchors shall typically be drilled and epoxied into horizontal concrete and rock surfaces (e.g., sidewalks, granite curbstones).

   d. DMP-Type 4 shall consist of 5-foot length of ¾-inch diameter steel rod and a surface roadway box. Top of rod shall be rounded and punchmarked at its center.

   e. DMP-Type 5 shall consist of an observable point punchmarked on the top horizontal surface of steel sheeting or a soldier pile. The steel surface within 3 inches of the point shall be cleaned by wire brush to permit easy identification of the exact point. The point shall also be clearly identified using fluorescent spray paint adjacent to the point.

C. The Contractor shall furnish portable readout instruments for use during the Contractor's monitoring program. At least two identical readout units shall be furnished for each instrument, the second unit for use during the Engineer's monitoring program.

D. The Contractor shall furnish all installation tools, materials and miscellaneous instrumentation components.

E. Manufacturer of each instrument shall provide an instruction manual which shall include the following:

1. A description of the purpose of instrument.
2. Theory of operation.
3. Step-by-step procedure for:
   a. A pre-installation acceptance test when instruments are received on site, to ensure the instruments are functioning correctly prior to installation.
   b. Calibration of readout units.
4. A list of calibration equipment required and recommended frequency of calibration.
5. Step-by-step instrument installation procedure including materials, tools, spare parts and any borehole requirement, and post-installation acceptance tests.
6. Maintenance procedures for each instrument.
7. Step-by-step data collection procedure for each instrument.
8. Data reduction, processing, plotting and interpretation procedures for each instrument.

F. A factory calibration shall be conducted on all instruments at manufacturer's facility prior to shipment. Each factory calibration shall include a calibration curve with data points clearly indicated and a tabulation of the data. Each instrument shall be marked with a unique identification number.

CONSTRUCTION METHODS

ADD THE FOLLOWING:

148.61 INSPECTION

The Contractor shall keep records of work performed, and verify that gauges, targets, ranges, and other markers are in place and usable for the intended purpose. The Contractor shall furnish boats, boatmen, laborers, and materials necessary for inspecting, supervising, and surveying the work as specified in Section 4.17.

148.62 CONDUCT OF DREDGING WORK

A. The tunnel trench payment lines are the lines and grades, and the bottom width shown on the Plans. The Contractor may dredge to a steeper slope, however, in ledge, the excavated surface shall not encroach within the payment lines shown on the Plans.

B. The Contractor shall perform additional dredging and blasting required at the tunnel element joint locations, as shown on the plans, if Alternate 2, Pumped Sand Foundation, is selected.

C. The Contractor shall schedule and arrange dredging, blasting, and disposal operations so as not to interfere with or hinder, navigation, Port operations, or work of other Contractors. Should it become necessary to shift or move floating equipment, or to interrupt the Contractor's operation to accommodate the movement of vessels and other floating equipment, this shall be done immediately or when directed by the Engineer, and the Contractor will not be entitled to extra compensation.

D. Each night between sunset and sunrise and during periods of restricted visibility, the Contractor shall provide lights for floating plants, pipelines, ranges,

and markers. The Contractor shall also provide lights for buoys that could endanger or obstruct navigation. When night work is in progress, the Contractor shall maintain lights from sunset to sunrise for the observation of dredging operations. Lighting shall conform to United States Coast Guard requirements for visibility and color.

E. The Contractor shall furnish, set, and maintain ranges, buoys, and markers needed to define the work area and to facilitate inspection. The Contractor shall establish and maintain tide board gauges in approved locations. The Contractor shall install and maintain a recording type tide gauge. Electronic ranging and acoustic sounding will also be utilized for dredging control.

F. The Contractor shall maintain the plant, scows, barges, pipelines, and associated equipment to meet the requirements of the work.

G. The Contractor shall conduct a Water Quality Monitoring Plan in accordance with the requirements of the permits noted in Subsection 7.03.

Should allowable water quality levels be exceeded due to Contractor's operations, Contractor will be required to adjust its operations in such a manner that acceptable water quality standards are obtained. Adjustments to Contractor's operations may include, but are not limited to:

1. Dredging with an enclosed bucket clamshell dredge.
2. Reduction in overall dredging rate.
3. Use of silt curtains or similar sedimentation barriers.

4. Prohibition of dragging clamshell bucket across bottom to smooth it before subsequent dredging.
5. Prohibition of overflow from barge.
6. Reduction in speed at which bucket is raised or lowered through the water column.
7. Reduction in dredging during periods of relatively strong ambient transport and mixing (high winds, spring tides, ship traffic, etc.).

Adjustments to Contractor dredging operations in order to comply with permits and/or requirements of the water quality program shall not be cause for increase in Contract price or increase in Contract duration. Silt curtains shall satisfy the requirements specified in the Erosion and Sedimentation Control Plan (Exhibit II-C).

H. The Contractor shall use silt curtains whenever the limits established by the Water Quality Certificate are exceeded and in accordance with Exhibit II-C, Erosion and Sedimentation Control Plan.

I. The Contractor shall use silt curtains when dredging during months of February, March, April and May, and during the period of September 15 through October 15. Silt curtains shall satisfy the requirements specified in Exhibit II-C.

J. The Contractor shall remove fill located below MHW and above native material in South and East Boston by land excavation methods and equipment in accordance with Section 120. Dredging of this material will only be allowed with the authorization of the Engineer.

K. The Contractor may remove native material at BMIP in South Boston and BIF in East Boston by dredging. However, material removed from South Boston must be brought ashore and transported to the South Boston

Processing Facility. Similarly, material removed from East Boston must be transported to Governor's Island. Material destined for the South Boston Processing Facility must be brought ashore in South Boston. Should new facilities be required to bring material ashore in South Boston, Contractor shall obtain all necessary permits required for the construction of these facilities. The cost of these facilities and permits shall be included in the unit price bid for the work of this Section.

L. Contractor must dispose of Harbor Sediments at Governor's Island in East Boston. Harbor Sediments are to be taken ashore within the right-of-way adjacent the excavation support system in East Boston. Silt curtains shall be used around the off loading barges at all times. Should Contractor elect to construct new facilities to take material ashore, Contractor shall obtain all necessary permits required for the construction of these facilities. The cost of these facilities and permits shall be included in the unit price bid for the work for this Section. Harbor sediments shall be removed prior to dredging other material in the harbor.

M. Contractor shall install and maintain silt curtain around General Ship's intake located at the northwest corner of Pier 5 prior to commencement of dredging and shall not remove silt curtain until backfilling is completed.

N. All rock removed from the harbor shall be either reused by the Contractor or transported to, and disposed of, at the Massachusetts Bay Disposal Site.

148.63 SEQUENCE OF OPERATIONS

Dredging of the tunnel trench shall proceed in a manner to accommodate the placing of tunnel elements in accordance with the requirements specified in Section 961 and Section 8.03.

148.64 LIMITATIONS ON DREDGING IN ADVANCE OF PLACING PREFABRICATED TUNNEL ELEMENTS

The Contractor shall be responsible for maintaining the dredged trench as specified hereinafter. The Contractor is cautioned that an open trench may produce changes in the density of the water which may affect the buoyancy of the tunnel elements.

148.66 TEST BLAST PROGRAM

A. A test blast program shall be conducted by the Contractor, consisting of at least six individual test blasts prior to commencement of full scale production blasting. The purpose of the test program is to allow the Contractor to establish safe limits of vibration. The test blast program shall be conducted and reported in strict accordance with procedures outlined in the sections of these specifications covering blasting methods and vibration control.

B. No test blasting shall be started until after the locations, for the individual test blasts have been reviewed and approved by the Engineer.

C. The test event shall begin with a small number of charges and extend upward to the maximum yield to be used. The final test event shall simulate, as close as practicable, the explosive charge type, size, overlying water depth, charge concentration, charge separation, initiation methods, and implacement conditions anticipated for the largest detonations. One copy of the record for the test blasts shall be submitted in tabular form to the Engineer.

D. After the series of test blasts, the Contractor shall examine the representative structures of the preblast

survey as previously specified. Any new damage resulting from the test blasting shall be photographed and reported in detail to the Engineer.

E. At the conclusion of the test blast program, the Contractor shall examine all reports, surveys, test data, and other pertinent information; the conclusions reached shall be the basis for developing a completely engineered Blasting Plan. The procedure shall include sketches showing blasting patterns, weights and explosives, wiring, and charge emplacement. Copies of the developed procedure shall be submitted for review to the Engineer and upon completion of the review and acceptance, it shall be appended to, and become a part of, the aforementioned Blasting Plan. A maximum period of 21 calendar days will be required for review and acceptance by the Engineer. Such review period shall not be the basis for a claim for delay. In no event shall operational blasting proceed until the developed procedure for blasting has been reviewed and accepted by the Engineer. If the procedure is not acceptable, the contractor should revise and resubmit the procedure. The Engineer shall have 10 days for review and acceptance of all revised procedures.

148.67 BLASTING METHODS AND PROCEDURES

A. General: The Contractor shall take appropriate measures for avoiding blast damage which shall include, but are not limited to:

1. Choosing a suitable ignition pattern with millisecond delay detonators to minimize the instantaneous impulse.

2. Taking precautions to avoid flashover which shall include the following measures, unless otherwise allowed by the Engineer:

a. Keeping the top of the hole uncharged for a depth equal to at least one-half the burden width.

b. Using low sensitivity explosives in the entire pattern or loading the holes alternatively with high and low sensitivity explosives.

c. Inspecting the ignition system using ground fault testing.

3. Only Class B explosives shall be used by the Contractor, except that Class A explosives will be allowed for blasting caps only.

4. Storage facilities for explosives shall be constructed, as a minimum, to conform to Type 2, Storage Facilities as specified in Part 181 of Title 26, Code of Federal Regulation, listed in the above references, Subpart J, which includes requirements for hinges and hasps, and the locking system. The Contractor shall be responsible for obtaining storage facilities and coordinating transportation routes and obtaining all necessary permits therefor.

5. The amount of explosives permitted aboard the drill boat at any one time will be subject to the approval of the Engineer, but in no case shall such amount exceed that required by the Contractor for one day's operations. The Contractor will be required to return all explosives remaining on the drill boat or barge at the end of the day to the storage facility.

6. Only detonating fuses which are insensitive to external shock and friction are allowed.

B. Existing Conditions:

Contractors are expected to examine the site of the work, cores and logs, and after investigation, decide for themselves the character of materials and make their bids accordingly. The Engineer assumes no responsibility for the types of material encountered, nor does it guarantee that other materials will not be encountered in performance of the work. The removal cost of such other materials shall be included in the Bid Prices.

C. Blasting Control:

1. Submittals: The Contractor shall submit a weekly blasting operation schedule to the Engineer. This schedule shall be provided seven (7) days prior to commencement of blasting. On a weekly basis, the Contractor shall submit, in tabular form, a record for each blast which shall consist of date, time and location of blast, amount of explosives used, peak particle velocity, and all other data necessary to adequately control blasting operations. See Figure 148-1 for minimum content of the weekly blasting record (a copy is attached to this Special Provision). A memorandum or telephone report on vibration intensity shall be submitted within 24 hours when specifically requested by the Engineer or without request when such intensity exceeds a peak particle velocity of 1.5 inches per second at any structure.

2. The vibration specialist shall adopt appropriate measures for blast damage reduction and shall be fully involved in a design of the test blasting and monitoring program and the final production blasting and monitoring program. Twenty-one days shall be allowed for the Engineer to review

and accept the final blasting plan. The vibration specialist shall be retained throughout the operational program to provide and verify round-by-round blasting records. Location of blast monitoring instruments shall be selected by the Contractor and are to be approved by the Engineer.

3. Millisecond delay caps shall be used on all blasting work.

4. Blasting shall be controlled in such a manner that the maximum ground vibration level at any structure shall not exceed a zero-to-peak particle velocity of 1.9 inches per second. The instrumentation shall record all three components (vertical, longitudinal, and transverse with respect to the location of the blast) of particle velocity direct (or shall have sufficient resolution of acceleration or displacement such that particle velocity can be readily and accurately determined from the record). The instantaneous vector sum of the three directional components of vibration will be used to compute the maximum vibration level.

5. Blasting shall be controlled such that the maximum water overpressure is 15 pounds per square inch at nearest underwater structure. The instrumentation shall record dynamic water pressure and frequency of underwater shock waves. Transducers shall be suspended in the water adjacent to and directly in front of the underwater structure being monitored.

6. Explosives will be contained within the drill holes using care to prevent spillage.

D. Safety: The Contractor shall take all reasonable precautions for protection of individuals and property. Such precautions shall include, but are not limited to:

1. The Contractor shall take all necessary precautions to prevent damage to any vessel (moored or under-way), structures or property, and preserve the crew or occupants thereof from exposure to injury as a result of his operations. No blasting or dredging will be permitted when LNG and/or oil tankers enter the harbor.

2. The Contractor shall take all precautions necessary to warn and protect any swimmers, boaters, or other individuals in the water, prior to any blasting; also, coordinate operations with General Ship Corporation personnel to avoid injury to underwater divers.

3. Transport of explosives and detonators shall be in vehicles suitably grounded and protected from lightning strikes and electrical storm phenomena, in accordance with federal and state requirements, and to the satisfaction of the Engineer.

4. No explosive material shall be handled, transported, or in any way made use of, during any period of electrical storm, of lightning or other electrical phenomenon. In the event that any such condition should appear imminent or occur, or if some known leakage of electricity should occur in the neighborhood of, or in the work area while the transport, handling, making up, charging, or such like use of explosives is being effected, then the work area shall be evacuated and abandoned completely until at least 30 minutes after the condition has ceased or the leakage stopped. The Engineer will be notified prior to any blasting or loading operation so that stationary or mobile radio transmission is not made on the site.

5. The handling, storage, and use of explosives shall be governed by the applicable provisions of the Section on "Blasting" of the Corps of Engineers Manual, EM-385-1-1, dated April 1981, entitled, "Safety and Health Requirements Manual", as amended, referred to in Clause 56, "Accident Prevention". In addition, the Contractor shall make necessary arrangements as may be required by the applicable U.S. Coast Guard, State, County, Municipal or Massachusetts Port Authority codes, rules, regulations and laws, and shall be responsible for compliance therewith, including storage of explosives. All handling, use, and storage of explosives will be under the personal supervision of a Licensed Blaster. No blasting is permitted when visibility is less than 1,500 feet in fog or rain, and between beginning of evening nautical twilight and ending of morning nautical twilight or when a vessel is within 1,500 feet of the blast.

6. A warning whistle shall be sounded prior to any blast.

148.68 WORK RESTRICTIONS

A. To reduce impacts to fish, the Contractor will be required to schedule work as follows:

1. No blasting will be permitted during periods of dead slack water.

2. Blasting will be minimized during peak fish runs. During these periods, consistent with all safety requirements, the Engineer may order a temporary halt to blasting operations in the event that a peak fish run is detected in the vicinity or appears imminent.

B. Unless specifically approved by the Department, blasting will not be allowed during the following periods:

- April 1 through June 15
- September 15 to October 15

C. No blasting will be permitted within 600 feet of an in-place tube section.

D. No blasted rock shall protrude above pre-construction harbor bottom levels. Contractor shall conduct soundings at regular intervals during progress of the blasting work and furnish data to the Engineer. Should data indicate protrusion of rock above pre-construction levels, contractor shall remove all such rock at no increase in contract cost or contract duration.

148.70 UNAUTHORIZED TUNNEL TRENCH EXCAVATION

Should the trench be dredged beyond the indicated grades, side slopes and depth shown on the plans without authorization or should contractor's construction methods create unsuitable foundation conditions, the additional excavation, the additional foundation course material or tremie concrete (as directed by the Engineer), additional backfill and locking backfill will not be considered for payment.

148.71 AUTHORIZED ADDITIONAL TUNNEL TRENCH EXCAVATION

Should unsuitable or unstable materials be discovered at or below the bottom elevations or side slopes shown on the plans, the Contractor shall immediately notify the Engineer in writing. Upon written direction from the Engineer, the Contractor shall then remove such unsuitable or unstable materials to such additional depth, and to such slopes as the Engineer may direct in writing. Payment for

any authorized additional tunnel trench excavation will be at the Contract unit price. The space shall be filled with the applicable backfill course, as specified in Section 490 herein, or as directed in writing by the Engineer. Soundings shall be taken before and after such additional trench excavation.

148.72 MAINTENANCE OF TUNNEL TRENCH

A. The Contractor shall maintain the bottom dimensions of the trench, and the trench side slopes until the backfill materials have been placed to the required elevations. After the dredging of any area has been completed to the required lines and grades, silt and other material that has entered the dredged trench shall be removed by redredging. The trench shall be fine dredged immediately prior to placing of the foundation course for the tunnel elements, if the Contractor is using the screeded gravel foundation. The trench shall be fine dredged immediately prior to placing tunnel elements if the Contractor is using the pumped sand foundation. Silt and other material that have accumulated on top of the foundation course shall be removed immediately prior to placing of tunnel elements. There will be no additional payment for redredging or fine dredging required for maintaining the dredged trench, or replacing the foundation to the prescribed grades.

B. The Contractor shall make provisions for the removal of silt or other unsuitable materials under the tunnel prior to installing foundation by the pumped sand method.

C. The Contractor shall remove and dispose of any buoyant material or debris which dislodges from the trench slopes.

148.73 DISPOSAL OF DREDGED MATERIALS

A. The disposal of dredged materials in unauthorized places is prohibited.

B. For purposes of disposal the harbor lines are defined as a vertical plane through the line where the dikes in East and South Boston intersect the MHW line (104.5 feet).

C. For materials dredged from the harbor, other than rock and harbor sediments, the Contractor shall safely transport to and dispose of the materials at the Massachusetts Bay Disposal Site.

D. Native materials dredged from Boston Marine Industrial Park (BMIP) and Bird Island Flats (BIF) and landward of the above-defined harbor lines shall be transported to and disposed of at the South Boston Processing Facility for material removed from BMIP, and Governor's Island for material removed from BIF.

E. The Contractor may reuse the blasted rock removed from the harbor, or transport it and dispose of it at the Massachusetts Bay Disposal Site.

F. The Contractor shall deposit dredged material by hopper dredge or self-dumping scow or barge. The Contractor shall not remove loaded or partially loaded scows, barges, or hopper dredges from the dredge area until the Engineer has been notified. The Contractor will notify the Engineer when scows or barges are returned to the dredge area.

148.74 NAVIGATION WARNINGS

The Contractor shall furnish, install, and maintain navigation warning signs on all floating equipment as directed by the Engineer and U.S. Coast Guard.

148.75 SALVAGED MATERIAL

Anchors, chains, firearms, and other articles of possible historical or archeological value brought to the surface during dredging operations shall become the property of the Department and shall be deposited on shore at a convenient location near the site of the work, as directed by the Engineer.

148.76 SAFETY OF STRUCTURES

The Contractor shall maintain the stability of piers, dikes, bulkheads, and other structures lying on or adjacent to the site of the work, insofar as structures may be jeopardized by dredging operations. The Contractor shall repair damage resulting from dredging operations, insofar as such damage may be caused by variation in locations or depth of dredging, or both, from that indicated or permitted under the Contract.

148.77 PLANT REMOVAL

Upon completion of the work, the Contractor shall promptly remove plant, including ranges, buoys, piles, and other markers or obstructions.

148.78 INSTRUMENTATION

A. Quantities and approximate locations of all instruments to be installed by the Contractor are shown on the Plans. Exact locations will be determined in the field, by the Engineer in cooperation with the Contractor, to minimize interference to other construction work. The Contractor will be responsible for monitoring all instrumentation, including that installed by the Management Consultant.

B. The Geotechnical Specialist shall install following guidelines included in the manufacturer's installation

manuals and as detailed on the approved submittals, monitor, and interpret data from instrumentation, in addition to that specified herein, that the Contractor deems necessary to ensure the safety of personnel and the work. Raw data collected by the Contractor from any such additional instrumentation shall be collected in the same manner as for the specified instrumentation. Raw, reduced and plotted data shall be made available to the Engineer within 24 hours of reading. When readings indicate ground and/or structure movement, the Engineer shall be notified immediately.

C. Inclinometers shall be installed at the locations and depths shown on the Plans, generally as follows. After installation, the bottom 10 feet of inclinometer casing shall be within a stratum suitable for providing base fixity, such as bedrock or glacial till.

1. Plumb the drill rig carefully. Using a wash boring or rotary drilling method, install HW flush-joint casing to the specified depth of the bottom cap, plus any additional depth needed to accommodate any required bottom weight. If drilling in bedrock is required, the boring in bedrock shall be 3.75 inches minimum diameter. Take a sample of the material assumed to provide base fixity. Wash until the water runs clear. Maximize cutting removal by using the reverse circulation method, with the wash pipe as the intake, its lower end a few inches from the bottom of the borehole.

2. If the boring extends into bedrock, verify that grout will not run into the bedrock by using the following method. Add drill casing so that the top is 10 feet above the ground surface. Fill the drill casing with water, and observe the level. If the level remains at the top of the casing for five

minutes, proceed with Step 3. If the level falls, tremie special grout Type B into the bottom 10 feet of the borehole, redrill, regrout and redrill as necessary until, with the water-filled casing 10 feet above the ground surface and the borehole drilled 10 feet into bedrock, water remains at the top of the casing for five minutes.

3. Install the bottom cap on the inclinometer casing. Verify that the drill casing is free to move. Using a tremie method, fill the drill casing with special grout Type B.

4. Add sufficient weight to the bottom of the inclinometer casing to overcome buoyancy caused by the grout, and lower coupled inclinometer casing throughout the borehole, filling with water, sealing joints to prevent grout ingress, and maintaining required groove orientation.

5. When all inclinometer casing is installed, withdraw drill casing without rotation, and top up with special grout Type B.

6. Perform post-installation acceptance test by verifying that groove orientation is correct and that the inclinometer probe tracks correctly in all four orientations.

7. Flush inclinometer casing with clean water. Allow grout to set. Repeat flushing and post-installation acceptance test.

8. Install surface protection.

9. Determine as-built location in horizontal position to an accuracy of ±0.03 foot, and in elevation to an accuracy of ±0.01 foot. The point selected to determine horizontal position shall be indicated on the installation record sheet.

D. Deformation monitoring points (DMPs) shall be installed at the locations shown on the Plans, generally as described below. After installation of a DMP, determine as-built location in horizontal position to an accuracy of ±0.03 foot, and in elevation to an accuracy of ±0.01 foot.

1. DMP-Type 1 shall be driven with a hammer into asphalt-covered surfaces.

2. DMP-Type 2 shall be set in epoxy grout in holes drilled into vertical surfaces of building foundations.

3. DMP-Type 3 set in epoxy grout in holes drilled into horizontal concrete and rock surfaces.

4. DMP-Type 4 shall be installed by excavating a hole adequate for the roadway box, driving the rod to the required depth, and installing the roadway box. If the rod cannot be driven to the required depth, it shall be withdrawn, and reinstalled by advancing a borehole to the full depth of the rod, and grouting the annulus with cement grout.

5. DMP-Type 5 shall be installed on the top horizontal surface of steel sheeting or a solider pile. The steel surface within 3 inches of the point shall be cleaned by wire brush to permit easy identification of the exact point. The point shall also be clearly identified using fluorescent spray paint adjacent to the point.

E. Inclinometer readings shall be made in accordance with the manufacturer's instruction manual. An inclinometer reading is defined as a set of readings at 2 feet intervals throughout the casing, and a second set at 180 degrees to the first set. A formal initial inclinometer reading shall consist of the average of three

readings as defined above, involving six complete traverses along the casing. A previous or subsequent reading shall be a single reading. Check-sums (sum of two readings 180 degrees apart, at each depth) shall be examined in the field, and shall remain within +20 readout units of the mean of all check-sums for that reading.

F. A formal initial set of readings on a Deformation Monitoring Point (DMP) shall consist of the average of two readings of DMP location in both plan and elevation, using surveying methods. A previous or subsequent reading shall consist of a single set of readings of DMP location in both plan and elevation. all elevation readings shall be referenced to deep benchmark, and all readings of plan position shall be referenced to stable horizontal control stations. Reading accuracy for elevation shall be ±0.01 foot. Reading accuracy for plan position shall be ±0.03 foot.

G. The Contractor shall protect all instruments and appurtenant fixtures, leads, connections, and other components of instrumentation systems from damage due to construction operations, weather, traffic, and vandalism. All instrumentation materials, after receipt at the site and prior to installation, shall be stored in an indoor clean, dry and secure storage space.

H. The Contractor shall not disclose any instrumentation data to third parties and shall not publish data without prior approval of the Department.

I. Contractor shall perform weekly readings during construction until completion and submit data in hard copy and electronic format acceptable to the Engineer.

J. The Contractor shall remove all instrumentation at the completion of the project or during construction as directed by the Engineer.

K. The geotechnical engineering specialist retained by the Contractor assigned to furnish, install, maintain and calibrate instrumentation, and to conduct the Contractor's monitoring program, shall have at least five years of experience in installation and monitoring of the types of instruments specified herein.

The geotechnical engineering specialist shall:

1. Prepare detailed procedures for all instruments specified herein, for factory calibration, pre-installation acceptance tests, installation, post-installation acceptance tests, field calibration, collection of initial data, collection of subsequent data, data reduction, processing, plotting, interpreting and reporting, protection from damage, and maintenance.

2. Review and sign all submittals.

3. Be on site and supervise at least the first two installations of each type of instrument.

4. Conduct at least the first two activities of each of the following tasks for each instrument specified herein: pre-installation acceptance tests, post-installation acceptance tests, field calibration, data collection, reduction, processing, plotting, interpreting.

L. A factory calibration shall be conducted on all instruments at the manufacturer's facility prior to shipment.

M. Manufacturer shall provide the warranty for each portable readout unit furnished for the Engineer's monitoring program.

N. When instruments are received at the site, the geotechnical engineering specialist shall make pre-installation acceptance tests to ensure that the instruments are functioning correctly prior to installation. Pre-installation acceptance tests shall follow the guidelines included in the manufacturers' instruction manuals, and as detailed in the approved submittal.

O. Whenever withdrawing drill casing or augers during instrument installation in a borehole, care shall be taken to minimize the increments and rate of casing or auger withdrawal so that collapse of the borehole does not occur and to ensure that backfill material does not build up inside the casing or auger such that the instrument is lifted as the casing or auger is withdrawn. The casing or auger shall be withdrawn without rotation. The casing or auger may be omitted only where it can be shown to the satisfaction of the Engineer that instrument installation without the casing or auger will not cause collapse of the borehole or in any way adversely affect instrument installation.

P. The geotechnical engineering specialist shall conduct regular field calibrations and maintenance of readout units used for the Contractor's monitoring program, and regular maintenance of field terminals and accessible instrument components, following the guidelines included in the manufacturers' instruction manuals, and as detailed in the approved submittal. The Engineer will be responsible for the regular calibration and maintenance of readout units used for the Engineer's monitoring program.

Q. Data shall be recorded on the approved forms. Field data records shall include at least the following:

- project name
- instrument type

- date and time
- observer
- readout unit number
- instrument number
- readings
- remarks
- visual observations
- other causal data including weather, temperature, and construction activities

R. A formal initial piezometer reading shall consist of the average of three readings with the water level indicator. A previous or subsequent reading shall be a single reading with the water level indicator. Reading accuracy shall be ±0.05 foot.

COMPENSATION

148.80 METHOD OF MEASUREMENT

DELETE entire section and replace with the following:

A. The quantity of dredged material for payment is the computed quantity up to the payment lines shown on the Plans, not including any volume of rock and ledge. The payment lines represent a maximum limit. Should Contractor dredge to a steeper slope, the Contractor will be paid only for the quantity actually removed.

B. The quantity of ledge removed is the volume between the actual surface of the ledge and the maximum payment lines as shown on the Plans. Should Contractor dredge to a steeper slope, the Contractor will be paid only for the quantity actually removed.

C. The cost of mobilizing and demobilizing dredging plant will not be paid for separately, but the cost

thereof shall be included in the appropriate unit price bid item of this Section.

D. The Engineer will review drill holes before blasting to determine actual ledge elevations. Plan quantities will be revised if drill holes indicate a top of ledge different than shown on the Plans.

E. Development and compliance with the Blasting Plan, compliance with the Water Quality Monitoring Plan, the Erosion and Sediment Control Plan and regulatory requirements are considered incidental to the work and will not be measured for payment.

F. Additional dredging and ledge removal required for construction of the cofferdam in South Boston, as specified in Section 140.160, shall be included in Bid Item 140.1.

G. Instrumentation is considered incidental to the work and will not be measured for payment.

H. Engineer will review soundings furnished by the Contractor to determine the actual volume of materials removed.

148.82 Payment Items

148.01	Dredging (Alt. 1)	CY
148.02	Dredging (Alt. 2)	CY
148.31	Removal and Disposal of Ledge (Alt. 1)	CY
148.32	Removal and Disposal of Ledge (Alt. 2)	CY

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLARD STEWART Plaintiff v. DUTRA CONSTRUCTION CO., INC., Defendant	CIVIL ACTION NO. 95-11040-RCL

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR REHEARING

Now comes the defendant, Dutra Construction Co., Inc. and moves the Court to deny the plaintiff's Motion for Rehearing. The plaintiff seeks relief from the Court's interlocutory order granting the Defendant's motion for summary judgment on the Jones Act Count. For the reasons set forth below, the plaintiff is not deserving of a rehearing.

I. PROCEDURAL HISTORY

The defendant adopts the procedural history as set forth in the plaintiff's motion and adds the following. Lengthy memorandums of law were filed by both parties in support of their respective positions as regards the defendant's motion for summary judgment. The Court's decision granting the defendant's motion on Counts I and II but denying the motion on Count III was entered in the docket on March 29, 1999.

Notice of Appeal was filed by the plaintiff on April 19, 1999. On May 20, 1999 the plaintiff filed a Motion to Stay

Trial Pending Appeal. The Motion to Stay was opposed by the defendant and denied by the Court on June 17, 1999. Pretrial conference and trial dates were scheduled by the Court, but continued.

Notice of appearances have been filed by both parties in the United States Court of Appeal for the First Circuit ("Appeals Court"). The Designation of Contents of Appendix have been filed. The Appeals Court has ordered the parties to attend a Pre-Argument Settlement Conference on November 10, 1999. The appellant now has until December 10, 1999 to file his brief and appendix.

A. THE COURT DOES NOT HAVE JURISDICTION TO HEAR PLAINTIFF'S MOTION FOR REHEARING.

The plaintiff cites *Moore's Federal Practice* in support of his argument that the Court has jurisdiction to both hear the motion and modify the underlying interlocutory order. Perhaps a closer perusal of Moore's was in order.

"It is often said that filing a timely notice of appeal immediately transfers jurisdiction to the circuit court and divests court of jurisdiction over all matters relating to the appeal." 20 *Moore's Federal Practice,* §303.32[1] (3rd ed. 1999)

> The general rule is that a district court is divested of jurisdiction on filing of notice of appeal with respect to any matters involved in the appeal; however, where an appeal is allowed from an interlocutory order, the district court may still proceed with the matters not involved in the appeal. *Taylor v. Sterrett,* 640 F2d 663 (C.A.5) 1981.

"It is a judge made doctrine, designed to promote judicial economy and avoid the confusion and inefficiency that might flow from putting the same issue before two courts at the same time." *Id.* "After a notice of appeal is timely filed, the district court cannot take any action that would 'alter the status of the case as it rests before the circuit court,'" *Id.* at §303.32[2][a] citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982).

It helps the plaintiff not to argue that the appeal in the present action is interlocutory in nature. "The filing of a timely and effective notice of appeal diverts the district court of jurisdiction only with respect to the judgment brought up for review by the appeal." *Id.* at §303.32[2][b][v].

"A party who wishes to stop all proceedings in the district court pending an appeal from a judgment that does not fully dispose of the action should request a stay in the district court." *Id.* The plaintiff has already attempted to obtain a stay, which was denied by the Court. Because of that denial the plaintiff now seeks further relief by choosing an avenue not available.

It should be kept in mind that the plaintiff chose to appeal the interlocutory decision. 28 U.S.C. §1292(a)(3) gives the plaintiff the right of appeal but does not require that the plaintiff do so. "No rights are waived by not appealing from an interlocutory order when appeal is available, and all will be reserved for review in an appeal from the final judgment." *Id.* at §710.05[2][c]. It is reiterated in Moore's chapter on Admiralty Appeals that "the commencement of an interlocutory appeal by one party does not prevent the district court from proceeding *with other aspects* of the case." *Id.* (emphasis added).

The plaintiff's reference to *Wanamaker v. Columbian Rope Co.*, 907 F.Supp. 522 (2nd Cir. 1997) serves only to cloud the pertinent issues. The trial court in *Wanamaker* decided to revisit interlocutory decisions which had *not* been appealed. Thus, no jurisdictional conflicts existed. The case of *Commonwealth of Puerto Rico v. The S.S. Zoe Colocotroni* cited by the plaintiff is also inapplicable. That case involves a Rule 60(b) Motion after a final judgment and not an interlocutory appeal.

B. THERE ARE NO GROUNDS TO REVERSE THE COURT'S PRIOR DECISION

"Plaintiff's motion for rehearing is really a motion for reconsideration. The plaintiff has set forth fourteen pages of substantive argument. There will be nothing more to add at a second hearing not contained in the plaintiff's brief.

The plaintiff asks this Court not to treat his motion as a Rule 60(b) Motion for obvious reasons. Under Rule. 60(b) relief from judgment is warranted in limited circumstances. None of which are applicable here. There was no fraud, mistake or surprise. The plaintiff was represented by competent and experienced counsel. There is no newly discovered evidence.

A motion to reconsider an interlocutory order is not governed by Rule 60(b). It should be allowed only if justice so requires. It does not.

II. ARGUMENT

Although plaintiff's successor counsel would like to convince the court otherwise, the arguments made in his

motion for rehearing were previously addressed by the parties. There are no new issues raised which have not already been considered by the Court. The same issues, whether disputed or not, are rehashed. As before, there is no dispute that the plaintiff met the first two prongs of the test to establish seaman status. The plaintiff contributed to the function of the dredge and had a substantial attachment to it. The issue remains whether the Superscoop is a vessel.

After a thorough analysis of the *DiGiovanni* case, which as plaintiff concedes the Court is bound to follow the Court concluded the Superscoop was not a vessel. The plaintiff has come forth with no novel arguments that would compel the Court to reverse its decision made seven months ago. The Court's decision was based on sound reasoning and supported by the law in the First Circuit: Simply, dredging is not navigation or commerce. The Superscoop was designed and built for dredging. At the time the plaintiff was injured the Superscoop was not in navigation or transit.

The defendant refers to and again relies upon its detailed memorandi of law filed with its motions for summary judgment. The defendant will, however, address certain of the plaintiff's arguments.

A. <u>THE SUPERSCOOP IS A BARGE AND NOT A VESSEL</u>

The plaintiff attempts to distinguish *DiGiovanni* because the Court used the phrase "barges or other floats". The plaintiff goes on to argue that the Superscoop is a special purpose vessel and thus not a barge or other float. The plaintiff cites no First Circuit cases describing dredges

as being special purpose vessels. The plaintiff also interprets *DiGiovanni* too narrowly and fails to acknowledge the common meaning of the term used by the Court. By using the phrase "barges or other floats" the *DiGovanni* court was being expansive and not restrictive.

> Webster's Dictionary describes a *barge* as a roomy usually flat-bottomed boat used chiefly for the transport of goods on inland waterways and usually propelled by towing.
>
> Webster's provides the following definition for *dredge:* "a barge used in dredging". *Webster's Ninth New Collegiate Dictionary* Merriam-Webster (1983)

While all barges are not dredges, clearly all dredges are barges. Even if a dredge were somehow not a barge, it would fall within in the definition "other float."

Many of the "vessel like" characteristics listed by the plaintiff are shared by both the Betty F in *DiGiovanni* and the Superscoop. The characteristics are not relevant unless they assist in answering the question what is the primary purpose of the Superscoop.

The plaintiff cites one First Circuit case for the proposition that all dredges are Jones Act vessels. The case cited, *Gahagan Construction Corp. v. Armao,* 165 F2d 301 (1st Cir. 1948) did not address the issue whether the dredge was or was not a vessel. The *Gahagan* court was only asked to decide if the dredge was in navigable waters at the time of the accident. Decided forty-four years prior to *DiGovanni,* the *Gahagan* case can not be expected to shed any helpful light whether the Superscoop is a Jones Act vessel within the formula established by the First Circuit in 1992.

The plaintiff has attempted various means of circumventing the *DiGiovanni* case. The latest attempt is to convince the court that the Superscoop should not be put to the test because it is so clearly a vessel. The opposite is true. The Superscoop fails the vessel test as established. The Superscoop's use was not navigation based. Rather, it was used to stand as a float for the bucket crane that dug out the harbor tunnel. Greater, the Superscoop's use was, alternatively, dredging and simply as a work platform. The facts show that the dredge did not move in a controlled or navigable fashion, or by propulsion. Its infrequent movement was limited to short distances.

The plaintiff also argues that the primary purpose of a dredge is navigation and commerce. Not so. The primary purpose is dredging. The *DiGiovanni* looked for a definition of navigation and found one in *Bernard v. Binnings Construction Co.* 741 F2d 824 (5th Circuit, 1984) cited at *DiGiovanni* p. 1123: "The test is whether it was designed or used primarily for the transportation of cargo, equipment or persons across navigable waters." The Superscoop's primary purpose and the reason for which it was built was to float while firmly attached to the sea floor as a platform from which its crane and bucket dredged.

When the dredging took the Superscoop close to shore, as it did while creating the Ted Williams Tunnel, it was "shore side." This shore side purpose was no different than the shore side purpose of the Betty F in *DiGiovanni.*

B. <u>THE PLAINTIFF WAS NOT ATTACHED TO THE SCOW AND THE SCOW WAS NOT IN TRANSIT</u>

Belatedly the plaintiff makes his final argument: that he was a member of a fleet of vessels under common ownership or control. The so called fleet consisted of two scows and the Superscoop. The scow he was on when injured was in actual transit at the time.

This theory has several major holes. The fleet doctrine allows one to obtain seaman status through the permanent assignment to a group of vessels under common ownership or control. See, *Gizoni v. Southwest Marine Inc.* 56 F3d 1138 (9th Cir. 1995). The fleet doctrine is an exception to the rule that the seaman must have a permanent connection to a particular vessel. It affords protection to a seaman whose duties divide him regularly among vessels. An example is the seaman in *Chandris v. Latsis* 115 S.Ct. 2172 (1995). In *Chandris,* the plaintiff worked on any one of six passengers cruise ships owned by the defendant.

Willard Stewart spent 99 and 9/10s of his time aboard the SuperScoop (see plaintiff's brief). Other than going on board the scow to assist the CAT engineer on the morning of his accident, there is no evidence that he was ever on board either scow. By his own admission, even if all his remaining work time was divided between the two scows, it would equal 1/20 of one percent.

Once again the omniscient *DiGiovanni* decision is of assistance. The plaintiff in *DiGiovanni* was injured while standing on the deck of a supply barge. "The supply barge was in general use to carry supplies, but also served as a

work platform." *Id.* at 1121. The Court rejected the suggestion that the supply barge could serve as the vessel in navigation. The Court held that the plaintiff was not "assigned permanently to the supply barge." *Id.* at 1124. The Court added: "Whether plaintiff is to be considered a seaman must depend upon Betty F". *Id.*

Mr. Stewart's connection to and work upon the scow is considerably less than the connection Mr. DiGiovanni had with the supply barge.

The defendant also disputes whether at the time he was injured the scow was in actual transit. The scow was being held to the side of the Superscoop by the crane and bucket. It was maneuvered by the crane operator and pulled into the side of the Superscoop. When the scow and the barge came together, there was a bump causing the plaintiff to fall.

As stated previously, the plaintiff's connection is not to the scow but to the Superscoop. There is no dispute that the Superscoop was stationary at the time of the accident.

The movement of the scow a short distance along the side of the Superscoop while being held by the bucket is not "actual navigation or transit" without the meaning of the rule in *DiGiovanni*. The scow was connected to the Superscoop and was not transporting anything at the time. It is established that mere floating is not enough to establish a vessel in navigation. See: *Bernard v Binnings Construction Co.* 741 Fd 824 (5th Cir. 1984). Maneuvering the scow such a short distance is more akin to floating than transit.

III. CONCLUSION

For the foregoing reasons the plaintiff is not entitled to a rehearing.

By its attorneys,

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(7)

No. 03-814

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In The
Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

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QUESTION PRESENTED

To qualify for "seaman" status under the Jones Act, a worker must have an "employment-related connection to a vessel in navigation." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 357 (1995). What is the legal standard for determining whether a special purpose watercraft (such as a dredge) is a Jones Act "vessel"?

STATEMENT REGARDING PARTIES

All parties to the proceeding are listed in the caption of the case.

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OPINIONS BELOW

The court of appeals issued two reported opinions in this case. The opinion on the interlocutory appeal (*Stewart I*) – which addresses the vessel-status question presented here – is reported at 230 F.3d 461 (CA1 2000) and at 2001 AMC 1116, and is reprinted at Pet. App. 15. The opinion after final judgment (*Stewart II*) is reported at 343 F.3d 10 (CA1 2003) and at 2003 AMC 2734, and is reprinted at Pet. App. 1.

Neither of the district court's summary judgment orders is reported. The transcript of the hearing at which the district court orally granted summary judgment on the vessel status issue is reprinted at Pet. App. 33. The motion for summary judgment on the remaining claim, and the judge's handwritten notation granting that motion, is reprinted at Pet. App. 30. The formal judgment of the district court is reprinted at Pet. App. 32.

JURISDICTION

The court of appeals entered judgment on September 4, 2003. The Petition for Certiorari was filed on December 3, 2003. Exercising its jurisdiction under 28 U.S.C. § 1254(1), this Court granted the petition on February 23, 2004.

RELEVANT STATUTORY PROVISIONS

The Jones Act, 46 U.S.C. App. § 688(a), provides in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . .

Section 2 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 902, provides in relevant part:

> When used in this Act –
>
> * * *
>
> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include –
>
> * * *
>
> (G) a master or member of a crew of any vessel. . . .

Section 3 of the Rules of Construction Act provides in relevant part:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

1 U.S.C. § 3.

STATEMENT OF THE CASE

Petitioner Willard Stewart was hurt doing his work as a marine engineer assigned to respondent Dutra Construction Company's dredge *Super Scoop*. Stewart seeks personal injury damages from Dutra under the Jones Act, 46 U.S.C. App. § 688(a), which affords "any seaman" a negligence action against his employer. The issue ultimately at stake here is whether Stewart was a Jones Act "seaman."

1. Legal Background

Enacted in 1920, the Jones Act does not define the term "seaman." Twenty-six years later, however, this Court recognized that Congress had indirectly provided a definition. *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 6-7 (1946), held that the provision of the 1927 Longshore and Harbor Workers' Compensation Act (LHWCA) excluding "a master or member of a crew of any vessel" from LHWCA coverage (presently codified as 33 U.S.C. § 902(3)(G)) draws a line establishing the mutually exclusive coverages of the Jones Act and the LHWCA. In *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991), this Court explained the meaning of *Swanson*: "[T]he Jones Act is restricted to 'a master or member of a crew of any vessel.'" The *Wilander* Court added a critical guidepost: "The key to seaman status is employment-related connection to a vessel in navigation." 498 U.S. at 355.

In *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the Court took up the *Swanson/Wilander* definition and crafted it into the following test for determining Jones Act seaman status:

> [T]he employment-related connection to a vessel in navigation necessary to qualify as a seaman

> under the Jones Act comprises two basic elements: The worker's duties must contribute to the function of the vessel or the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature.

Id. at 376 (internal quotation marks and citation omitted). Note that the *Chandris* Court's two-element test for Jones Act seaman status includes five requirements: (1) the worker must have been employed on a vessel; (2) the vessel must be in navigation; (3) the worker's duties must contribute to the vessel's function or mission; (4) the worker's connection to the vessel must be substantial in duration; and (5) the worker's connection to the vessel must be substantial in nature. The present case centers on the first of these requirements – whether the dredge *Super Scoop* was a vessel.

2. Factual Background

The *Super Scoop* is a large barge equipped with a clamshell bucket. It operates as a dredge, digging material from the ocean floor and loading it into one of two scows that serve it. The scows then take the material out to sea and dump it. During Stewart's employment on the *Super Scoop*, it was digging a trench across Boston Harbor as part of the construction of the Ted Williams Tunnel.

The Coast Guard classifies the *Super Scoop* as an "industrial vessel." The *Super Scoop* has the "commonly

understood characteristics of a vessel,"[1] such as a captain and crew, navigational lights, ballast tanks, and a crew dining area. It is registered with the Coast Guard, and it is required to comply with safety regulations issued by the Coast Guard and the Department of Transportation. It has a load line certificate issued by the American Bureau of Shipping. And it is equipped with a global positioning system to enable it to navigate its planned route precisely.

The *Super Scoop* has limited means of self propulsion. It is moved long distances by tug. (To work on the Ted Williams Tunnel project, the dredge was towed from its home base in California through the Panama Canal and up the eastern seaboard to Boston Harbor.) It moves short distances by manipulating its anchors and cables. When dredging the Boston Harbor trench (working around the clock, seven days a week), the *Super Scoop* "typically move[d] once every two hours, covering a distance of thirty to fifty feet." *Stewart I*, Pet. App. 17.

On July 15, 1993, Stewart was working on board one of the scows. While Stewart was on deck, about ten feet above the engine area, the *Super Scoop* used its clamshell bucket to move the scow. The scow collided with the *Super Scoop*, causing a jolt that plunged Stewart headfirst through an open hatch down to the engine area below. He was seriously injured.

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[1] *Stewart I*, Pet. App. 26 n. 3 (quoting *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1120 (CA1) (en banc), *cert. denied*, 506 U.S. 827 (1992)).

3. Procedural Background

Stewart brought an admiralty action against Dutra in the United States District Court for the District of Massachusetts, seeking damages under the Jones Act. In the alternative – in the event that he were found not to qualify as a seaman – he sought recovery under section 5(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b).

The district court granted summary judgment for Dutra on the Jones Act claim, holding that Stewart did not qualify as a seaman under the First Circuit's standard announced in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (CA1) (en banc), *cert. denied*, 506 U.S. 827 (1992). *DiGiovanni* held that a barge or other float whose primary purpose was something other than the transportation of cargo, equipment, or persons across navigable waters is a Jones Act vessel "only when it is in actual navigation or transit" at the time of the plaintiff's injury. 959 F.2d at 1123.

As this is an admiralty case, Stewart was entitled to an interlocutory appeal under 28 U.S.C. § 1292(a)(3). On this appeal the First Circuit affirmed, holding that *DiGiovanni* compelled the district court's conclusion. *Stewart I*, Pet. App. 15-29. In the First Circuit's view, the *Super Scoop*'s "primary function" was dredging, "a form of construction," and thus not navigation or commerce. Pet. App. 27. And it was not in motion at the time of Stewart's injury.

Stewart then returned to the district court on his alternative claim for damages under LHWCA § 5(b), 33 U.S.C. § 905(b). The district court again granted summary judgment for Dutra. Stewart again appealed to the First

Circuit. While adhering to his argument that the *Super Scoop* was a Jones Act vessel, Stewart also argued that the district court had erred in denying his LHWCA claim. The court of appeals again affirmed. See Pet. App. 1-14 (*Stewart II*).

Because this Court is not presented with the LHWCA § 5(b) claim, only one aspect of the *Stewart II* holding is relevant here: The First Circuit held that, although the *Super Scoop* was not a vessel for Jones Act purposes, it *was* a vessel for LHWCA purposes. The *Stewart II* court took the view that "the LHWCA's definition of 'vessel' is 'significantly more inclusive than that used in evaluating seaman status under the Jones Act.'" Pet. App. 5 (quoting *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 607 (CA1 1996) (en banc), *cert. denied*, 520 U.S. 1117 (1997)).

SUMMARY OF THE ARGUMENT

The 1920 Jones Act enables "any seaman who shall suffer personal injury in the course of his employment" to sue the employer for negligence. It does not define the term "seaman." But Congress implicitly defined the term seven years later. In section 2 of the Longshore and Harbor Workers' Compensation Act (LHWCA), originally enacted in 1927, Congress uses the term "master or member of a crew of any vessel" to draw a line delineating the mutually exclusive coverages of the Jones Act and the LHWCA. LHWCA § 2(3)(G), 33 U.S.C. § 902(3)(G). In this way, Congress has defined a Jones Act "seaman" as "a master or member of a crew of any vessel" and thus read the term "vessel" into the Jones Act.

Neither LHWCA nor the Jones Act defines the term "vessel." In the Rules of Construction Act (which dates from 1873), Congress has defined a "vessel" as any "description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. The section 3 definition of "vessel" applies to all maritime statutes that do not otherwise define the term. The Jones Act is the "[f]oremost ... enactment in the field of maritime torts." *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1997). Thus the statutory definition must apply to the LHWCA/Jones Act use of the term "vessel."

Moreover, this Court has consistently held that when Congress uses a maritime (or other federal-law jurisprudential) term of art without defining it, the term is presumed to have its established jurisprudential meaning. When the 1927 Congress used the term "vessel," the section 3 definition had been on the statute books for over half a century, and this definition was in widespread use in this Court's and the lower courts' admiralty and maritime decisions. There is no discernible reason to ignore the statutory definition of "vessel" in defining a Jones Act seaman. Indeed, this Court has applied the section 3 definition of "vessel" in a closely analogous seaman-status context. See *Norton v. Warner Co.*, 321 U.S. 565, 571 & n.4 (1944).

The dredge *Super Scoop* falls squarely within the 1 U.S.C. § 3 definition of "vessel." It regularly functions as a means of transportation on water, and it exposes its crew members to the characteristic seamen's dangers associated with employment on vessels at work on navigable water. Chief among these dangers is the risk of collision with other vessels. Petitioner Willard Stewart was injured in a

collision between the *Super Scoop* and another vessel on which he was temporarily working.

Dredges must move across the surface of the water to do their work. They are wholly unlike drydocks (which typically move only up and down) and wharfboats (which do not intentionally move at all). Throughout its maritime jurisprudence, this Court has consistently treated dredges as vessels, as have the lower courts. By the time Congress used the term "vessel" in the 1927 LHWCA, it was conclusively settled that a dredge is a maritime-law vessel, and it is clear that Congress knew this.

The First Circuit's test for Jones Act vessel status is deeply flawed in a number of respects. It ignores the fact that the controlling term "vessel" comes from the 1927 LHWCA and is therefore defined by the Rules of Construction Act. By making the Jones Act vessel status of nontraditional craft turn on whether the craft was in motion at the moment of injury, the First Circuit's test violates this Court's rule that seaman status cannot be made dependent on "the situation as it exists at the instant of injury." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 363 (1995). And it strips the protections of the Jones Act from most seamen who work on nontraditional vessels, to the detriment of thousands of nautical and amphibious workers. The First Circuit's approach is radically at odds with the rest of the maritime law.

Applying the Rules of Construction Act definition of "vessel" in Jones Act cases will not overstretch the Jones Act's coverage. A watercraft is not a vessel under the Rules of Construction Act unless it is used as a means of transportation or is "practically" capable of being so used. *Evansville & Bowling Green Packet Co. v. Chero Cola*

Bottling Co., 271 U.S. 19, 22 (1926). And the "vessel" requirement is only one of the five requirements for seaman status that this Court laid down in *Chandris*. By making the "vessel" requirement do most or all of the work of delineating the respective coverages of the Jones Act and LHWCA, the First Circuit has effectively minimized the importance and obscured the meaning and function of the other four.

ARGUMENT

I. Congress has explicitly defined the term "vessel" for Jones Act purposes in 1 U.S.C. § 3

This case presents a straightforward question of statutory construction: Does petitioner qualify as a "seaman" under the Jones Act? When construing the terms of a federal statute, it should go without saying that the courts must look first to Congress to define those terms. Congress has defined the central term at issue in this case, "vessel," in 1 U.S.C. § 3. The Court should therefore apply that definition here.

A. Congress defines a "vessel" as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water"

Title 1 of the United States Code was codified and enacted into positive law by the Act of July 30, 1947, ch. 388, 61 Stat. 633. Chapter 1 of Title 1 is captioned "Rules of Construction" and is often referred to as the Rules of Construction Act. It presently consists of eight sections. Section 3, 1 U.S.C. § 3, provides:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

B. Congress created the vessel requirement for Jones Act seaman status in the 1927 Longshore Act

The 1920 Jones Act, 46 U.S.C. App. § 688(a), gives "any seaman who shall suffer personal injury in the course of his employment" the right to sue the employer in tort for negligence. It does not define "seaman." In *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926), this Court held that the term encompassed a land-based longshoreman. The following year, Congress enacted the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, which provides a workers' compensation remedy for a broad range of maritime workers and immunizes those workers' employers against tort liability. Congress was concerned with land-based maritime workers and did not mean to bring seamen under the LHWCA: In section 2(3) of the LHWCA, it excluded "a master or member of a crew of any vessel" from LHWCA coverage. This provision is now codified as 33 U.S.C. § 902(3)(G).

Swanson v. Marra Bros., 328 U.S. 1 (1946), held that Congress meant for the Jones Act and LHWCA to have mutually exclusive coverages, that LHWCA's broad coverage provisions overruled *Haverty*, and that LHWCA § 2(3) "confine[d] the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters." 328 U.S. at 6-7. In *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991), this Court explained *Swanson* as follows:

> "[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute.

Id. at 347. As was again emphasized in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the LHWCA term "master or member of a crew of any vessel" thus draws a line between the "mutually exclusive compensation regimes" of the Jones Act and LHWCA. *Id.* at 355-56. This case turns on the meaning of the term "vessel" as used by the 1927 Congress in drawing that line.

C. When an Act of Congress uses a maritime term of art without defining it, the term is presumed to have its established meaning

As was noted above, the Jones Act does not define its key coverage term, "seaman." And neither it nor the LHWCA provides any definition of "vessel."[2] In *Wilander* this Court began its inquiry into the meaning of the term "seaman" by stating that "we assume that when a statute uses [a maritime term of art without defining it], Congress intended [the term] to have its established meaning." 498

[2] The Jones Act does not even use the term "vessel." At first blush LHWCA § 2(21), 33 U.S.C. § 902(21), looks like a definition, but it is circular: "Unless the context requires otherwise, the term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer, or crew member."

U.S. at 342. The *Wilander* approach to defining statutory terms is not peculiar to the Jones Act or even to the maritime context. On the contrary, it is "[a] cardinal rule of statutory construction."[3] The rule should apply with equal force to determining the meaning of the term "vessel."

D. The 1 U.S.C. § 3 definition of "vessel" was well established in 1927

The definition of "vessel" in 1 U.S.C. § 3 replicates section 3 of the Revised Statutes of 1873, which provided:

> The word "vessel" includes every description of water-craft or other artificial contrivance used, or

[3] See *Molzof v. United States*, 502 U.S. 301, 307 (1992), where the Court addressed the meaning of the term "punitive damages" in the Federal Tort Claims Act, 28 U.S.C. § 2674, by stating: "A cardinal rule of statutory construction holds that 'where Congress borrows terms of art which are accumulated in the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.'" The *Molzof* Court was quoting from *Morissette v. United States*, 342 U.S. 246, 263 (1952), where the issue was the definition of the crime of knowing conversion of Government property. See also *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (dealing with the meaning of the term "held in trust" in the National Labor Relations Act, 29 U.S.C. § 186(c)(5), and stating that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."); *Braxton v. United States*, 500 U.S. 344, 351 note (1991) (taking the same approach to the term "attempt to kill" in a federal criminal statute).

> capable of being used, as a means of transportation on water.

This definition in turn derived from the Act of June 29, 1870, ch. 169, § 7, 16 Stat. 170. This Act was titled "An Act to reorganize the Marine Hospital Service, and to provide for the Relief of sick and disabled Seamen." Section 7 provided:

> For the purposes of this act, the term "vessel," herein used, shall be held to include every description of water-craft, raft, vehicle, and contrivance used or capable of being used as a means or auxiliary of transportation on or by water.

This same definition had earlier been used in the Act of July 18, 1866, ch. 201, § 1, 14 Stat. 178 – "An Act to prevent Smuggling and for other Purposes."

The purpose of section 3 was to supply a definition of "vessel" for general application throughout the Revised Statutes. Given the potential breadth of the definition's application, Congress would certainly have tried to define the term consistently with the current maritime-law understanding. A well-respected maritime-law expert has explained that Congress succeeded:

> There is no legally significant difference between the statutory definition of the term "vessel" and the meaning attributed to it by the general maritime law as obtaining in this country. While one may not ascribe to the Congress an intent to restate [nonstatutory] maritime law when it enacted a definition for the construction of statutes generally, it is highly unlikely that Congress, in formulating a definition of a word of so immediate a connection with maritime law and so likely

> to recur in maritime legislation, could have intended materially to depart from the meaning under the general maritime law. This conclusion is supported by subsequent enactments of Congress. For example, when Congress codified certain aspects of the law of maritime liens in the Maritime Lien Acts of 1910 and 1920, it had no intention to change the basic principles of maritime law. Nevertheless, Congress was content to leave the Acts to be construed in accordance with the general statutory definition of the word vessel, which if indeed different from the meaning under the general maritime law would have had the effect of changing the law. *It is manifest that the legislation was predicated on the assumption that the statutory definition was identical with the meaning under the general maritime law.*
>
> Steven F. Friedell, 1 *Benedict on Admiralty* § 165 (7th rev. ed. 2003) (emphasis supplied) (footnotes omitted).

Professor Friedell's view is significantly confirmed by the fact that in the decades following its enactment in 1873, the section 3 definition was in widespread use throughout the country's maritime jurisprudence. In *Ellis v. United States*, 206 U.S. 246, 259 (1907), this Court used section 3 to hold that dredges were vessels, with the result that dredge crew members were characterized as seamen and excluded from the coverage of a federal statute limiting the working hours of "laborers and mechanics." In *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 20-22 (1926), the Court used the section 3 definition to hold that a wharfboat (floating warehouse) was not a vessel so that its owner could not claim the benefit of the Shipowners' Limitation of Liability Act. And in *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 626-27 (1887), the Court paraphrased the section 3 definition in

the course of holding that a dry dock was not a vessel and hence could not be the subject of a salvage award.

The section 3 definition had been widely applied by the lower courts as well.[4] The 1927 Congress is bound to have known that the maritime term of art "vessel" generally meant what Revised Statutes § 3 said it meant.

[4] See, e.g., *City of Los Angeles v. United Dredging Co.*, 14 F.2d 364, 365 (CA9 1926) (dredge was a section 3 vessel and hence exempt from city boiler-inspection requirements); *George Leary Constr. Co. v. Matson*, 272 F. 461, 462 (CA4 1921) (pile-driver scow was a section 3 vessel so that a crew member was entitled to seamen's personal injury remedies); *Eastern S.S. Corp. v. Great Lakes Dredge & Dock Co.*, 256 F. 497, 501 (CA1), *cert. dismissed*, 250 U.S. 676 (1919) (type of dredge termed a "drillboat" was a section 3 vessel so that its owner could seek the protection of the Shipowners' Limitation of Liability Act); *The International*, 89 F. 484, 484-85 (CA3 1898) (dredge was a section 3 vessel and thus exempt from seizure under a tariff act); *Saylor v. Taylor*, 77 F. 476, 477 (CA4 1896) (dredge was a section 3 vessel so that its crew members were entitled to seamen's wage liens); *Charles Barnes Co. v. One Dredge Boat*, 169 F. 895, 896 (E.D. Ky. 1909) (pumpboat was a section 3 vessel and hence subject to maritime liens for supplies) (citing and discussing dozens of vessel-status cases); *In re Eastern Dredging Co.*, 138 F. 942, 943 (D. Mass. 1905) (harbor scow was a section 3 vessel so that its owner could claim the protection of the Shipowners' Limitation of Liability Act); *Seabrook v. Raft of Railroad Cross-Ties*, 40 F. 596, 598 (D.S.C. 1889) (dredge and raft that struck it were both section 3 vessels for purposes of adjudicating collision liability); *The Pioneer*, 30 F. 206, 207 (E.D.N.Y. 1886) (dredge was a section 3 vessel and thus subject to a maritime lien for supplies); *Zurich Gen. Acc. & Liab. Ins. Co. v. Industrial Accident Comm'n*, 191 Cal. 770, 218 P. 563, 566 (1923), *cert. denied*, 263 U.S. 772 (1924) (dredge was a section 3 vessel so that a crew member's widow could not receive state workers' compensation benefits but must pursue seamen's remedies).

E. Legislative history shows that Congress meant for the 1 U.S.C. § 3 definition to have broad application throughout the maritime law, including the Jones Act context

Section 1 of the Rules of Construction Act, 1 U.S.C. § 1 (captioned "Words denoting number, gender, and so forth") includes four rules of construction and eleven definitions. It introduces all of this with the phrase: "In determining the meaning of any Act of Congress, unless the context indicates otherwise – ." Section 1 of the Revised Statutes was similarly structured. It set forth three rules of construction and a number of definitions and provided that these should apply throughout the Revised Statutes and to any act of Congress passed after February 25, 1871, "unless the context shows that such words were intended to be used in a more limited sense."

In defining "vessel," 1 U.S.C. § 3 does not include the "context indicates otherwise" proviso. Nor did section 3 of the Revised Statutes. Therefore, it is not clear that the proviso can impose *any* limit on the applicability of the definition set forth in 1 U.S.C. § 3.

But even should the proviso be deemed applicable, it cannot possibly detract from the applicability of the 1 U.S.C. § 3 definition in Jones Act cases. In the first place, the Jones Act is the "[f]oremost . . . enactment[] in the field of maritime torts." *American Dredging Co. v. Miller*, 510 U.S. 443, 445 (1997). The context therefore supports the applicability of Congress's maritime-law definition of "vessel" rather than in any way indicating otherwise.

In the second place, the legislative history of the 1 U.S.C. § 3 definition of "vessel" shows that the "context-otherwise" proviso, if applicable at all, has a very narrow

range of applicability. The current definition is a verbatim reenactment of section 3 of the Revised Statutes (omitting only the hyphen in "watercraft"). The commissioners appointed by Congress to compile the Revised Statutes accompanied the statute defining "vessel" with the following commentary:

> It should be observed that this definition is subject, as are the others in the chapter, to the general rule, (section 24 [referring to the commentary on Revised Statutes § 1],) that it applies only where the context or the nature of the provision does not show that the term is used in a different sense. This will protect the few instances where the word "vessel" is used in the statutes in the sense of a utensil for holding commodities, *e.g.*, act of July 20, 1868, ch. 186, § 19, [15] *Stat. at L.*, 132; "every person * * owning any still, boiler, or other *vessel* used for the purpose of distilling spirits."

Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose ch. 3, p. 20, Sec. 27 (1872). This commentary – cautioning against using the section 3 definition of "vessel" to discriminate among pots and pans – shows that the definition was intended and expected to apply broadly throughout the maritime law, and to be displaced only when self-evidently inapplicable.

In light of the broad maritime-law applicability of the 1 U.S.C. § 3 definition and the *American Dredging* characterization of the Jones Act as the centerpiece of maritime tort law, there is no discernible justification for ignoring the section 3 definition in Jones Act vessel-status cases.

F. Other statutes show that Congress meant for the 1 U.S.C. § 3 definition to have broad application

Congress has vouched for the broad applicability of the 1 U.S.C. § 3 definition in at least nineteen other statutes which either incorporate the section 3 definition by reference or set forth a definition that is very close to the section 3 definition.[5] The congressional aim for broad application of the definition could hardly be plainer.

[5] The Shipping Act, 46 U.S.C. § 2101(45), incorporates section 3 by reference. Seventeen statutes contain functionally identical paraphrases of the section 3 definition. See the Merchant Marine Act of 1920, 46 U.S.C. App. § 801; the International Regulations for Preventing Collisions at Sea Act, 33 U.S.C. § 1601(1); the Inland Navigation Rules Act of 1980, 33 U.S.C. § 2003(a); the Whaling Convention Act, 16 U.S.C. § 916(e); the Oil Pollution Act of 1990, 33 U.S.C. § 2701(37); the Federal Water Pollution Control Act, 33 U.S.C. § 1321(a)(3); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601(28); the Public Health Service Act, 42 U.S.C. § 201(i); the Contraband Seizure Act, 49 U.S.C. § 80301(3); the Tariff Act of 1930, 19 U.S.C. § 1401(a); the Interstate Act Against Importation of Motor Vehicles, Vessels and Aircraft, 18 U.S.C. § 553(c)(3); the Excise Taxes Act, 26 U.S.C. § 5688(c); the Neutrality Act of 1939, 22 U.S.C. § 456(c); the Interstate Commerce Act, 49 U.S.C.A. § 13102(23) (Supp. 2003); the Communications Act of 1934, 47 U.S.C. § 153(39)(A); the Sentencing Reform Act, 18 U.S.C. § 3667; the Anti-fouling Paint Control Act of 1988, 33 U.S.C. § 2402(11). The Deepwater Ports Act, 33 U.S.C. § 1502(19), is a looser paraphrase of the section 3 definition, omitting the "capable of being used" language. Other statutes with broadly similar definitions of *vessel* are the Submarine Cables Act, 47 U.S.C. § 30, and the Federal Ship Mortgage Insurance Act, 46 U.S.C. App. § 1271(b). For a much more inclusive definition, see the Anti-Gambling Act, 18 U.S.C. § 1081.

G. This Court has used 1 U.S.C. § 3 to determine the meaning of the term "vessel" for analogous seaman-status purposes

The question in *Norton v. Warner Co.*, 321 U.S. 565 (1944), was whether a worker who had sole charge of a harbor barge was denied LHWCA coverage by the provision excluding "a master or member of a crew of any vessel," 33 U.S.C. § 902(3)(G). In answering that he was, this Court quoted 1 U.S.C. § 3 as the authoritative definition of "vessel." 321 U.S. at 571 n. 4. The Court did not *hold* that the worker was covered by the Jones Act (it could not, since he was not before the Court seeking Jones Act coverage); but it said he was. See *id.* at 573, 569 n. 3. *Norton* thus came close to deciding the precise issue presented here.

The *Norton* decision is relevant also for two aspects of the Court's methodology. First, the Court prefaced its quotation of 1 U.S.C. § 3 with a signal that Revised Statutes § 3 contained the same definition. See 321 U.S. at 571 n. 4. The Court also examined the pre-1927 vessel-status jurisprudence.[6] In these respects, the *Norton* Court exemplified the *Wilander*-prescribed methodology – seeking the general maritime-law understanding of a maritime term of art that Congress has not defined in the statute under scrutiny.

[6] In addition to quoting 1 U.S.C. § 3 and referencing Revised Statutes § 3, the *Norton* Court cited a number of older vessel-status cases, including *Ellis* (discussed *supra* at 15) and the lower courts' decisions in *Seabrook*, *Eastern Dredging*, and *City of Los Angeles* (discussed *supra* at 16 n. 4). See 321 U.S. at 571.

Second, in its ultimate deference to the language of 1 U.S.C. § 3 – i.e., in its use of 1 U.S.C. § 3 to supply the definition of a term that Congress had left undefined in the statute that controlled the case – *Norton* is an early example of the approach to maritime personal injury issues that became expressly dominant in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). The *Miles* Court held that the implications of the Jones Act prevented it from extending to the survivors of fatally injured seamen a general maritime law remedy that is available to other maritime workers' survivors. The Court said that "[m]aritime tort law is now dominated by federal statute," *id.* at 36, and that "[i]n this era, an admiralty court should look primarily to these legislative enactments for policy guidance." *Id.* at 27. In light of *Norton* and *Miles*, there can be no justification for failure to apply Congress's definition of the maritime term "vessel" to cases arising under the "[f]oremost . . . enactment in the field of maritime torts." *American Dredging*, 510 U.S. at 455.

H. The 1 U.S.C. § 3 definition is not overly inclusive in the Jones Act context

In its prior uses of the section 3 definition, this Court has significantly narrowed its potential scope. The proponent of vessel status in *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926), owned and operated a wharfboat on the Ohio River at Evansville, Indiana. This structure was essentially a floating warehouse. When in use, it was secured to the shore by four or five cables, and it was connected to the city's water, electricity, and telephone systems. It had no means of propulsion and was not subject to government inspection. Since its installation at Evansville in 1910, its

only movement was an annual trip, under tow, to Green River harbor to protect it from winter ice. When it sank in 1922, damaging others' merchandise, the owner petitioned for limitation of liability under a statute that protects only "the owner of any vessel." Revised Statutes § 4282 (Limitation Act § 3), now codified at 46 U.S.C. App. § 183. In claiming to be a shipowner, the company invoked the Revised Statutes § 3 definition of a vessel, arguing that the wharfboat qualified because it was "capable" of being used for transportation. This Court rejected the argument, stating:

> It was not *practically* capable of being used as a means of transportation. It served at Evansville as an office, warehouse, and wharf, and was not taken from place to place. The connections with the water, electric light, and telephone systems of the city evidence a permanent location. It performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed.

271 U.S. at 22 (emphasis added).

The *Evansville* narrowing of the section 3 definition was foreshadowed in *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887), in which the plaintiff sought a salvage award for having prevented a permanently moored dry dock from sinking and argued that the dry dock was a vessel because it was a "water-craft and artificial contrivance, used and capable of being used as a means of transportation on water." *Id.* at 626. The *Cope* Court rejected the plaintiff's argument, explaining that in doing its work,

the dry dock moved up and down but never horizontally, and that it was therefore not a vessel because "[i]t was not designed for navigation, and could not be *practically* used therefor." *Id.* at 627 (emphasis supplied).

The definition of "vessel" set forth in 1 U.S.C. § 3 has thus been significantly limited by the authoritative gloss applied by this Court in *Cope* and *Evansville*, whereby the statutory term "capable of being used as a means of transportation on water" means "*practically* capable" of being so used.

Moreover – and perhaps more importantly – the vessel requirement is only one of five separate requirements for seaman status: aspiring seamen must also show that the vessel was in navigation, that their work furthered its mission or function, that their connection to it was substantial in duration, and that their connection to it was substantial in nature. See *Chandris*, 515 U.S. at 376. The *Chandris* Court explained each of these four requirements in such a way as to provide the lower courts with suitable tools for "focus[ing] upon the essence of what it means to be a seaman." *Id.* at 369. Each of the tools performs a substantial limiting function.

When the *Chandris* opinion is properly consulted, the way in which each of the four requirements limits Jones Act coverage – and the application of each of them in the present case – is readily understood. (a) The "in navigation" requirement addresses whether the vessel has been taken out of service. See 515 U.S. at 372-75. A vessel will be considered out of service, i.e., "withdrawn from navigation,"

id. at 374, if it has been laid up for a substantial period of time for major repairs, overhauling, or refitting.[7] Employment aboard such a vessel is not seaman's work.[8] The *Super Scoop* was plainly in navigation at the time of Stewart's injury. Although dredging operations had been suspended for repairs to one of the *Super Scoop*'s scows, Dutra has not contended that this temporary shutdown took the dredge out of navigation. Rather, Dutra's argument has been that the *Super Scoop*'s stationary condition at the moment of injury kept it from being a Jones Act vessel. (b) The contribution-to-ship's function requirement asks whether the worker was "doing the ship's work." *Id.* at 357, 368. Amphibious workers who ride a vessel to work (for example, on a fixed offshore oil or gas platform) or sleep and eat on a vessel without doing any work there fail this requirement.[9] Dutra has not argued that Stewart, a

[7] The "in navigation" inquiry examines the vessel's "navigational status," *Waganer v. Sea-Land Service, Inc.*, 486 F.2d 955, 958 (CA5 1973), and not its activities at the moment of injury. A vessel has navigational status while doing its work on the water, whatever that work is, and it retains that status until and unless it is "withdrawn from navigation," *Gonzales v. United States Shipping Board*, 3 F.2d 168, 171 (E.D.N.Y. 1924), or "taken out of service," *Wayne Construction, Inc. v. Lenard*, 56 F.3d 75, 1995 WL309188 at *3 n.2 (CA9 1994) (unpublished).

[8] See *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952) (denying Jones Act seaman status to a worker on a fleet of sightseeing motorboats that was laid up for the winter). Cf. *Roper v. United States*, 368 U.S. 20 (1961) (holding that a worker on a ship in the mothball fleet could not bring an action for unseaworthiness); *West v. United States*, 361 U.S. 118 (1959) (same).

[9] See, e.g., *Ketnor v. Automatic Power, Inc.*, 850 F.2d 236, 239 (CA5 1988) ("Ketnor merely rode on the vessels to go from rig to rig so that he could perform his rig servicing duties on the rig. He thus was not a Jones Act seaman."); *Roberts v. Williams-McWilliams Co.*, 648 F.2d 255,

(Continued on following page)

marine engineer, did not further the *Super Scoop*'s mission. (c) The substantial-in-duration requirement generally means that the worker must have spent at least "30 percent of his time [while working for the current employer] in the service of a vessel in navigation." *Id.* at 371. Stewart spent 100% of his work time with Dutra serving the *Super Scoop*. (d) The substantial-in-nature requirement addresses whether the worker's duties "regularly expose[d] [the worker] to the perils of the sea." *Id.* at 368. Stewart's work exposed him to a range of deep-water and vessel-movement dangers, and he was hurt in a collision between two vessels.

II. Under 1 U.S.C. § 3, the dredge *Super Scoop* is a vessel

A. The *Super Scoop* regularly functions as a means of transportation on water

In order to perform the Boston Harbor project, the *Super Scoop* had to be towed from the Pacific to the Atlantic Ocean, bringing its essential equipment with it. It then had to "move through Boston Harbor, from East Boston to South Boston, digging the ocean bottom as it moved." *Stewart II*, Pet. App. 2. Its job at Boston was to produce a gigantic trench. Stationary dredging would have produced a hole, not a trench. The *Super Scoop* cannot do its work without transporting its crew and equipment across the water.

263 (CA5 1981) (holding that an offshore worker could not claim to be a member of the crew of a barge on which he slept every night).

Despite changes in technology, the *Super Scoop* differs in no material way from the dredge *Pioneer*, which an experienced admiralty judge readily characterized as a vessel over a century ago. In *The Pioneer*, 30 F. 206 (E.D.N.Y. 1886), Judge Benedict looked for guidance to the definition of "vessel" in section 3 of the Revised Statutes. See *id.* at 207. He also explained why the *Pioneer* was a vessel under any suitable definition:

> She is a dredge used for the purpose of moving the steam-shovel from place to place, upon navigable water, and maintaining the same afloat while being operated to deepen the channel by shoveling up sand, mud, and silt, from the bottom, and depositing the same in other scows. It is evident that, without the ability to navigate and transport the shovel and engine on navigable water, secured by the method of her construction, the structure in question could not perform the work for which it was intended, and, without this ability, the shovel would be substantially useless. . . . A certain form and certain characteristics have been given her, for the sole purpose of enabling her to navigate the water, and to transport from place to place and maintain afloat the shovel placed upon her; and her occupation is to transport and maintain afloat on navigable water the shovel, the engine, and the coals used to work the engine.

Id. at 206. Except for the reference to "coals," everything Judge Benedict said about the *Pioneer* is applicable to the *Super Scoop*.

The court below was thus simply wrong in characterizing the *Super Scoop* as an "extension[] of the land." *Stewart I*, Pet. App. 27. No part of the *Super Scoop*'s work

in Boston Harbor occurred while it was attached to or extended from the land, and it could not perform any of its normal operations while so attached.

B. This Court has consistently treated dredges as vessels

This Court has decided three cases in which it held or assumed that dredges are vessels. In *Ellis v. United States*, 206 U.S. 246, 259 (1907), the Court held that two dredges working in Boston harbor were vessels, relying on the definition of "vessel" in Revised Statutes § 3. *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957), held that a dredge crew member (who had never even seen the dredge move) was a Jones Act seaman. In *The Virginia Ehrman*, 97 U.S. 309 (1877), a ship being towed by a tug ran into an anchored steam dredge, sinking the dredge. In holding that the ship and tug were both liable to the owners of the dredge, the Court repeatedly referred to the dredge as a "ship," *id.* at 310, "vessel at anchor," *id.* at 315, and "vessel," *id.* at 315, 316.

C. When Congress created the vessel requirement for Jones Act seaman status in 1927, the vessel status of dredges was conclusively established

When the 1927 Congress used the word "vessel" in the course of drawing a line between the coverages of the Jones Act and the LHWCA, it is bound to have known that the maritime law of the United States had conclusively settled the vessel status of dredges. This Court's decisions in *Ellis* and *Virginia Ehrman* were on the books, as were dozens of lower court decisions treating dredges as vessels

(such as *The Pioneer*, *supra* at 26). By 1915, there had been so many decisions classifying dredges as vessels that a court could quickly reject a contrary argument as too "unsound" to merit discussion. *The Steam Dredge No. 6*, 222 F. 576, 580 (S.D.N.Y. 1915), *aff'd*, 241 F. 69 (CA2 1917). A decade later there remained "no doubt" that dredges are vessels. *The Hurricane*, 2 F.2d 70, 72 (E.D. Pa. 1924), *aff'd*, 9 F.2d 396 (CA3 1925). In 1930, the Fourth Circuit said the vessel status of dredges "is sustained by the overwhelming weight of authority." *Butler v. Ellis*, 45 F.2d 951, 955 (CA4 1930).

D. Legislative history confirms that the 1927 Congress used the term "vessel" to include dredges

When Congress began working on the LHWCA, a seaman's union lobbied vigorously against including seamen under the Act's coverage. See 68 Cong. Rec. 5908 (March 4, 1927). Persuaded, the Senate sent the House of Representatives a bill (S. 3170) that excluded "a master or seaman as defined in section 4612 of the Revised Statutes." Union Calendar No. 644, 69th Cong., 2d Sess. at 2 (1927). (Revised Statutes § 4612 defined "master" to include "every person having command of any vessel belonging to any citizen of the United States," "seaman" to include "every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board [any vessel belonging to any citizen of the United States]," and "vessel" to "comprehend *every description of vessel navigating on any sea or channel, lake, or river*." Emphasis supplied.)

The House Judiciary Committee disagreed with the Senate and wanted to include seamen in the LHWCA. It

reported out a bill that contained the following definition of the workers to be covered by the LHWCA:

> The term "employee" means an employee employed in maritime employment, in whole or in part, upon the navigable waters of the United States, including any dry dock, *or as master or member of a crew of any barge, lighter, tug, dredge, vessel, or other ocean, lake, river, canal, harbor, or floating craft owned by a citizen of the United States*.

H.R. Rep. No. 69-1767, 69th Cong., 2d Sess. at 1 (1927) (emphasis supplied).

Subsequently the view that seamen should be excluded prevailed on the House side as it had in the Senate. The House Judiciary Committee version of the bill was amended to take the form – with the "master or member of a crew of any vessel" exclusion – in which it was ultimately enacted into law. See 68 Cong. Rec. 5402-03 (March 2, 1927).

Comparing the three versions of S. 3170 makes it plain that Congress thought dredges are vessels for seaman-status purposes. The contentious point was whether seamen should be in or out of the LHWCA. (1) Believing seamen should be out, the Senate defined them as the crew members of "every description of vessel." (Here the term "vessel" is obviously used generically.) (2) Believing seamen should be in, the House Judiciary Committee defined them as the crew members of "any barge, lighter, tug, dredge, vessel, or other ocean, lake, river, canal, harbor, or floating craft." (Here the term "vessel" is not used generically; it means *ship*. The generic term in this version is "floating craft.") (3) Eventually agreeing that

seamen should be out, the House defined them as the crew members of "any vessel." (As in the Senate version, "vessel" here is generic.)

On the floor of the House, the Chair of the Judiciary Committee repeatedly assured his colleagues that the final version of the bill "make[s] clear the taking out of the seamen." 68 Cong. Rec. 5402 (March 2, 1927); see also *id.* at 5410. In vigorous support of that claim, another House member stated:

> The opposition to the inclusion of seamen became so great that every reference to them was taken out of the bill. . . . Seamen and fishermen were entirely eliminated.

Id. at 5412. The final floor debate in the Senate also included repeated assurances that "the seamen want to be out . . . [a]nd they are [now] out." *Id.* at 5908. In neither chamber was there any countervailing claim: Everyone who spoke concurred that the term "vessel" (as used in the final version of the bill with the purpose of excluding seamen) covered everything that had been spelled out in the House version to include seamen, *viz.*: barge, lighter, tug, *dredge*, vessel [ship], or other ocean, lake, river, canal, harbor, or floating craft.

E. Because Stewart's work exposed him to the perils of the sea, classifying the *Super Scoop* as a vessel furthers the purposes of the Jones Act

In *Chandris*, this Court said that "seamen receive protection [from the Jones Act] because of their exposure to the 'perils of the sea.'" 515 U.S. at 354. "Perils of the sea" is a term of art that this Court has regularly used to

signify the dangers characteristic to seamen's work.[10] The *Super Scoop*'s work exposes its crew to many of these dangers. In the relatively open waters of the harbor, the workers face wind and weather risks that are different from those confronting dock workers. Working at a significant distance from shore and often in deep water, dredges' crews run a grave risk of drowning. The reported Jones Act jurisprudence suggests, for example, that special-purpose vessels may be more prone to capsizing than traditional ships.[11] Dredges must generally move across the water to do their work, which generates a range of vessel-movement dangers. Being afloat, frequently out in

[10] See, e.g., *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 558-59 (1997) (referring to the work of a deckhand on a harbor craft as "seagoing activity" and stating that such work subjects the worker to "the perils of the sea"). In *Chandris*, 515 U.S. at 354, and in *Wilander*, 498 U.S. at 354, the Court indicated its general view of the nature of the perils of the sea by citing David W. Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79 (1985). This article identifies the characteristic seamen's dangers as including "the full range of dangers associated with deep water, wind and weather, tides and currents, ocean predators, great distances from shore, relative isolation, and inaccessibility of shore-side facilities for aid and succor" as well as the full range of "risks attending the movement of vessels on navigable water." *Id.* at 80-81. Cf. *Chandris*, 515 U.S. at 355 (characterizing work on an Ohio River towboat as "life upon the sea") (quoting *Warner v. Goltra*, 293 U.S. 155, 157 (1934)).

[11] See *Offshore Co. v. Robison*, 266 F.2d 769, 780 (5th Cir. 1959) (noting that "in many instances Jones Act seamen [on special-purpose vessels] are exposed to more hazards than are blue-water sailors. They run the risk of top-heavy drilling barges collapsing."); *Gault v. Modern Continental/Roadway Constr. Co.*, 100 Cal. App. 4th 991, 123 Cal. Rptr.2d 85, 87 (2002) (describing the capsizing of a construction barge). Cf. *Conoco, Inc. v. Halter-Calcasieu, L.L.C.*, 865 So.2d 813, 816 (La. App. 2003) (non-Jones Act decision describing the sinking of a drydock whose operator unwisely tried to use it as a means of transportation).

the open, and continually changing their position, dredges like the *Super Scoop* are at significant risk of collision with other vessels, an obvious and indeed paradigmatic seaman's risk. Here, Stewart was injured because of that very risk: He was hurt when the vessel on which he was temporarily working collided with the dredge to which he was assigned.

III. The First Circuit's test for Jones Act vessel status is fundamentally flawed

A. The First Circuit, impermissibly ignoring the applicable statutory definition, treats a nontraditional vessel as a Jones Act vessel only when the vessel is in motion

The decision below purported to make no new law but merely to follow the First Circuit's *en banc* decision in *DiGiovanni*. See *Stewart I*, Pet. App. 16, 25, 29. The *DiGiovanni* court accepted the defendant's argument that the crane barge *Betty F* "was not to be regarded as a [Jones Act] vessel," 959 F.2d at 1120. It held that a floating structure or apparatus is not a Jones Act vessel unless "it was 'used primarily for the transportation of cargo, equipment, or persons across navigable waters'" or was "in actual navigation or transit" when the Jones Act plaintiff was injured. *Id.* at 1123 (quoting *Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 829 (5th Cir. 1984)). The court indicated that by "actual navigation or transit" it meant movement across the surface of the water.

B. The First Circuit's test violates the *Chandris* Court's anti-snapshot rule

In *Chandris*, a majority of this Court rejected an argument that "anyone working on board a vessel for the duration of a 'voyage' in furtherance of the vessel's mission has the necessary employment-related connection to qualify as a seaman." 515 U.S. at 357. The Court articulated its rejection of the argument as follows:

> In evaluating the employment-related connection of a maritime worker to a vessel in navigation, courts should not employ "a 'snapshot' test for seaman status, inspecting only the situation as it exists at the instant of injury; a more enduring relationship is contemplated in the jurisprudence." Thus, a worker may not oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged when injured.

Id. at 363 (quoting *Easley v. Southern Shipbuilding Corp.*, 965 F.2d 1, 5 (CA5 1992)). The Court explained that it was rejecting what it regarded as a "snapshot" argument because of "the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act (and, perhaps more importantly for purposes of the employers' workers' compensation obligations, who will be covered by the LHWCA) before a particular workday begins." 515 U.S. at 363.

DiGiovanni was decided before *Chandris*, and the *DiGiovanni* court proudly labeled its approach as a snapshot test, proclaiming: "That there should be a varying status designation depending on the *activity at the moment* is not a novel concept." 959 F.2d at 1123 (emphasis added). On this ground alone, it is plain that the First

Circuit test is wrong. *Chandris* implicitly[12] overruled *DiGiovanni*.

C. The First Circuit rule is in tension with this Court's decisions holding that the term "seaman" in the Jones Act is defined by section 2(3)(G) of the LHWCA

Each of this Court's modern seaman-status decisions has reiterated the *Swanson* holding, 328 U.S. at 6-7, that LHWCA § 2(3)(G), which excludes a "member of a crew of any vessel" from that Act's coverage, also defines the term "seaman" in the Jones Act. See *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 553 (1997); *Chandris*, 515 U.S. at 355-56; *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 86-88 (1991); *Wilander*, 498 U.S. at 347. Section 2(3)(G) thus draws a line between the mutually exclusive coverages of the two statutes.

It would undermine the mutual exclusivity of the two statutes if the phrase "member of a crew of any vessel" had different meanings for Jones Act and LHWCA purposes. It necessarily follows that "vessel" must have the same meaning in the Jones Act and LHWCA contexts. Yet the court below held to the contrary. In *Stewart I*, it held

[12] While it did not directly address *DiGiovanni*'s test for vessel status, the *Chandris* Court's vigorous condemnation of the moment-of-injury approach to seaman status unmistakably disapproves the heart of *DiGiovanni*. The *Chandris* Court quoted a dictum from *DiGiovanni* that "a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside." 515 U.S. at 373 (quoting *DiGiovanni*, 959 F.2d at 1121). This quotation of a tangential aspect of the First Circuit's opinion cannot be seen as an endorsement of the holding that was indirectly condemned.

that the *Super Scoop* was not a Jones Act vessel. Then in *Stewart II*, it recognized that the *Super Scoop* was a LHWCA vessel. See Pet. App. 5 (citing *Morehead*, 97 F.3d at 607). One of these conclusions must be wrong. Permitting inconsistent meanings of the term "vessel" would bring a fundamental incoherence to the very center of this Court's delineation of seaman status.

D. The First Circuit's rule is inconsistent with this Court's decisions recognizing the vessel status of dredges and comparable watercraft

The First Circuit's rule denies vessel status to dredges (unless they are in motion at the time of the incident in suit) and is thus inconsistent with this Court's decisions in *Ellis*, *Senko*, and *Virginia Ehrman*. See *supra* at 27. It is also in tension with other decisions of this Court in which the vessel status of dredges was indirectly assumed or signaled,[13] and with a number of other decisions in which

[13] See *Standard Dredging Co. v. Murphy*, 319 U.S. 306, 308 n.3 (1943) (citing with evident approval Internal Revenue Service Cumulative Bulletin 1937-1, p. 408, which states that "dredges used for navigation and transportation in carrying on the work of deepening and removing obstructions from channels and harbors are vessels within the meaning of . . . the Social Security Act"); *Norton*, 321 U.S. at 571 & n.4 (citing approvingly to *Ellis* and two lower-court cases upholding the vessel status of dredges – *City of Los Angeles v. United Dredging Co.*, 14 F.2d 364 (CA9 1926), and *Seabrook v. Raft*, 40 F. 596 (D.S.C. 1889) – in support of its conclusion that a harbor barge was a Jones Act vessel); *The Robert W. Parsons*, 191 U.S. 17, 30 (1903) (citing *The Alabama*, 22 F. 449 (C.C.S.D. Ala. 1884), which upheld the vessel status of a dredge-scow flotilla, in support of its holding that horse-drawn Erie Canal boats were vessels).

the vessel status of comparable watercraft was explicitly[14] or implicitly[15] recognized by this Court.

E. The First Circuit's rule is inconsistent with the purposes of the Jones Act

The thrust of the First Circuit's approach to vessel status is to strip the protections of the Jones Act from most seamen on nontraditional vessels, although these workers regularly face the perils of the sea. The First Circuit's restrictive test denies statutory benefits to workers that Congress intended to protect. It is a radical departure, affecting thousands of nautical and amphibious workers. The Petition for Certiorari demonstrates how

[14] See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 535 (1995) (indicating that a crane/pile-driving barge is undebatably a vessel "for admiralty tort purposes"); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 83, 92 (1991) (holding that a jury could reasonably find that a shipyard's crane barge was a Jones Act vessel); *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) (per curiam) (holding that a jury could reasonably find that an offshore construction barge was a Jones Act vessel); *Gianfala v. Texas Co.*, 350 U.S. 879 (1955) (per curiam) (holding that a trier of fact could reasonably find that a submerged drilling barge was a Jones Act vessel); *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930) (holding that a railroad "car float" was a vessel for LHWCA purposes).

[15] See *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983) (treating a coal barge as a vessel for LHWCA purposes); *Director v. Perini North River Associates*, 459 U.S. 297 (1983) (treating a waterfront construction barge as a vessel for LHWCA purposes); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 566 (1982) (awarding seaman's penalty wages to "pipeline welder" on "Lay Barge 27"); *Cantey v. McLain Line, Inc.*, 312 U.S. 667 (1941) (per curiam) (treating a harbor dump scow as a Jones Act vessel); *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940) (treating a harbor scow as a vessel for LHWCA purposes).

radically the First Circuit's doctrine departs from the law in the other maritime circuits. The extent of the departure is obvious and alarming.[16]

F. The First Circuit's overemphasis on the vessel requirement for seaman status discourages lower courts and counsel for properly attending to the other four requirements

By making the vessel requirement for seaman status do most or all of the work of drawing the line between Jones Act and LHWCA workers, the First Circuit's approach diverts the attention of courts and counsel from the other four requirements for seaman status and thus from key facts that the other requirements are designed to elicit and evaluate. For example, one cannot tell from reading the *DiGiovanni* opinion the extent to which the injured worker was exposed to vessel-movement dangers. And while the court below must have realized that Stewart's work regularly exposed him to vessel-movement dangers – indeed, he was hurt in a collision between two vessels – the court's preoccupation with the vessel requirement seems to have prevented it from realizing the significance of this fact.

[16] The Second Circuit Court of Appeals has noted that the First Circuit's rule is "far more restrictive than [that of] any [other] circuit." *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30, 34 (CA2 1996). Dissenting in *DiGiovanni*, Judge Torruella complained that the First Circuit approach is "clearly more restrictive" and "goes far beyond" that of any other circuit. 959 F.2d at 1128.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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In The Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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QUESTION PRESENTED

Whether the First Circuit correctly held that the dredging platform Super Scoop is not a Jones Act vessel where: (1) the Petitioner was working only temporarily on the platform and lived ashore; (2) the platform has no effective means of propulsion and no living quarters; (3) the platform performs no commercial or transportation functions, and is used only as a dredge; and (4) while dredging, the platform was confined to inland coastal waters and held stationary by four anchors?

CORPORATE DISCLOSURE STATEMENT

The Respondent Dutra Construction Company, Inc. ("Dutra") is a privately held California corporation that is a wholly owned subsidiary of The Dutra Group, a privately held California corporation. No publicly held company owns ten percent or more of the stock of either Dutra entity.

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OPINIONS BELOW, JURISDICTION, RELEVANT STATUTORY PROVISIONS

For these sections Dutra is satisfied with the statements provided by the Petitioner. Sup. Ct. Rule 24.2.

INTRODUCTION

This case presents the essential question whether the First Circuit correctly held that the dredging platform at issue here is not a Jones Act vessel. From the Petitioner's brief in this Court, one might suppose that this question was conclusively answered years ago by Title 1 U.S.C. § 3 and decisions of this Court. But the matter is not nearly that simple, as the Petitioner acknowledged below. Before the District Court and the First Circuit the Petitioner conceded that section 3 was *not* a controlling authority, and in his certiorari petition the Petitioner conceded that this Court has *never* directly addressed the issue presented here. These concessions, not the Petitioner's latest arguments, are correct, and the First Circuit's decision is solidly grounded in the logic of this Court's decisions and the Jones Act, and should be affirmed.

STATEMENT OF THE CASE

I. ESSENTIAL PROCEDURAL HISTORY

The Petitioner Willard Stewart sued Dutra in the United States District Court for the District of Massachusetts. (Joint App. 11) He asserted claims under the Jones Act and the Longshore and Harbor Workers

Compensation Act ("LHWCA"), alleging that he was injured while working on the dredging platform Super Scoop. Dutra moved for partial summary judgment on the Jones Act claim, arguing that the Super Scoop was not a vessel and the Petitioner was not a seaman within the meaning of the Jones Act. (Joint App. 17) The Petitioner opposed the motion, but he not only did not argue – as he does here – that 1 U.S.C. § 3 provides a controlling definition of the term "vessel" for Jones Act purposes, he acknowledged that it did *not*. (C.A. App. 67-79, 189-198, 204-206, 219)

Relying on the First Circuit's *en banc* decision in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir.), *cert. denied*, 506 U.S. 827 (1992), the District Court held that the Super Scoop was not a Jones Act vessel and granted Dutra's motion. The Petitioner took an interlocutory appeal and argued that *DiGiovanni* was wrong and, in any event, did not apply to the undisputed facts. Just as in the District Court, the Petitioner did *not* argue that section 3 provided a controlling and dispositive definition of "vessel." Indeed, the Petitioner conceded in his First Circuit brief that, "[u]nfortunately, there is no statute specifically defining ['vessel'] for the Jones Act." (Pet. C.A. br. at 19; *see also* C.A. App. 219)

The First Circuit affirmed. *Stewart v. Dutra Const. Co., Inc.*, 230 F.3d 461 (1st Cir. 2000). On remand, the Petitioner pursued his alternative claim that, if he was not a Jones Act seaman, he was a longshoreman under the LHWCA, 33 U.S.C. § 905(b). The District Court granted summary judgment as to that claim as well, and the Petitioner appealed. In his second appeal, the Petitioner again did not contend that 1 U.S.C. § 3 provided a dispositive definition of "vessel." The First

Circuit affirmed. *Stewart v. Dutra Const. Co., Inc.*, 343 F.3d 10 (1st Cir. 2003).[1]

The Petitioner then requested certiorari. Yet again, the Petitioner did *not* make the argument that is the cornerstone of his brief in this Court – that 1 U.S.C. § 3 provides a controlling definition of "vessel." Instead, the Petitioner argued that the circuits were in disarray as to the definition of a Jones Act vessel, and the First Circuit's 2000 decision was wrong. (Pet. for Cert. at 6-16) The Petitioner did make a passing reference to section 3 in his petition in a context that implied that it did *not* definitively define "vessel." (Pet. for Cert. at 7) The Petitioner also conceded that this Court has "*never* addressed the [Jones Act's] vessel status requirement. . . . " (Pet. for Cert. at 5; emphasis added)

II. ESSENTIAL UNDISPUTED FACTS

A. Dutra's Work Pursuant To its Contract

Dutra was a subcontractor on a project known as the I-90 Immersed Tube Tunnel Project, in which a tunnel for Interstate 90 (the Massachusetts Turnpike) was being created below Boston Harbor and portions of South Boston and East Boston ("I-90 Project"). In addition to dredging below a part of Boston Harbor, the contract required Dutra

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[1] The Petitioner implies in his brief that he will lose benefits if denied Jones Act coverage, but the reality is different. The Petitioner already has received *substantial* medical and lost-wage benefits under the LHWCA's worker's compensation provisions. *See generally Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 129 (1956) (The LHWCA provides employees "a substantial *quid pro quo* in the form of an assured compensation, regardless of fault, as a substitute for their excluded claims.")

to perform a number of land-based operations, including dredging non-harbor sediment "landward" on both the South Boston and East Boston sides of the harbor, loading the sediment onto trucks, stockpiling it on land prior to loading, and moving ledge removed from the harbor onto land. (Joint App. 109-147)

Dutra's harbor-related tasks on the I-90 Project included dredging part of the ocean floor below the harbor to create a trench for the tunnel, blasting, and drilling. Dredging was accomplished by the Super Scoop, a floating work platform with an integrated, permanently affixed crane and bucket. While dredging, the Super Scoop used an Electronic Positioning System ("EPS"). The EPS was used while the Super Scoop was stationary to pinpoint the precise spot where the Super Scoop's bucket was to remove sediment so that the trench met engineering specifications and there was quality control, not as a navigational tool. During the course of the project, Dutra's work and the jobsite were regularly inspected and supervised by the general contractor and government officials. (Joint App. 109-147; C.A. App. 253, 262-269)

B. The Petitioner and the Super Scoop

The Petitioner was hired by Dutra through the local mechanic's union to work as a mechanical engineer. (C.A. App. 135) He was not a Dutra employee and had no connection to the Super Scoop before the I-90 Project. (C.A. App. 46) The Petitioner was temporarily assigned to the Super Scoop for the I-90 Project; his job was to keep the Super Scoop's dredge functioning properly as it engaged in the earth-removal process. (C.A. App. 238) He is not by training or experience a mariner, and his job did not

include the handling or navigation of boats or ships. The Petitioner lived ashore in East Boston and commuted to work each day. (C.A. App. 90-91) He never resided on the Super Scoop, which had no living quarters or full kitchen. (C.A. App. 240-241, 247)

The Super Scoop was built in 1976 to operate solely as a dredge. It has virtually none of the features of a self-propelled, ocean-going vessel. It has no propulsion engine or propeller, and is not capable of efficient movement. (C.A. App. 138, 240) When it is moved to a jobsite it is pulled by tugboats. On such occasions, the Coast Guard requires that it be *unmanned*. (Joint App. 90-105) The Super Scoop can be manned by up to ten workers *only* when anchored and dredging in protected waters. (Joint App. 91) The Super Scoop is capable only of glacial, positional movement through manipulation of its anchors and cables. During a twelve-hour shift, the Super Scoop typically moved only about six times by distances of approximately 30-50 feet. (Pet. App. 17; C.A. App. 138) Each such movement required approximately five minutes. (C.A. App. 138) (After more than a year on the I-90 Project, the Super Scoop was moved a *total* of approximately three quarters of a mile. [United States Amicus br. at 20]) Otherwise, the Super Scoop was held stationary by four anchors.

The Super Scoop was not even capable of performing all functions necessary to complete the dredging process; it could remove material from the ocean floor, but could not store, transport, or discard the material. For those purposes the Super Scoop was assisted by scows, which essentially were floating hoppers that also were incapable of propulsion. On the I-90 Project, material removed from the harbor was placed into the scows; tugboats then pulled the scows to deeper waters for dumping. (Pet. App. 17)

C. The Circumstances of the Petitioner's Accident

At the time of the Petitioner's accident, the Super Scoop was held stationary by four anchors. It was not in operation because of mechanical difficulties with one of the scows used in the dredging process – scow number 4. The Petitioner was on scow number 4, which was secured by lines to the side of the Super Scoop. (C.A. App. 92-93, 139-143) The Super Scoop placed its bucket into the scow and, using its winch, pulled on the bucket in order to move the scow closer to the Super Scoop's side. As scow number 4 came to rest against the side of the anchored and stationary Super Scoop, there allegedly was a jolt that the Petitioner says caused him to fall.

SUMMARY OF THE ARGUMENT

I. This Court has never definitively defined the term vessel for purposes of the Jones Act, and has never held that dredges are Jones Act vessels. But the Court has repeatedly discussed the related "vessel" and "seaman" concepts. These decisions state certain fundamental principles that bear on whether the Super Scoop is a Jones Act vessel.

The principles the Court has established provide, among other things, that a float's business and purpose are important considerations; commercial transportation of passengers or cargo is a core vessel characteristic; vessels engage in navigation/voyages; vessels do something other than simply dredge; vessels engage in operations that expose crew members to the perils of the sea.

The First Circuit's *Stewart* decision flows directly from and respects these principles. The First Circuit

focused on the primary purpose of the Super Scoop and correctly concluded that its primary purpose was construction/dredging, not commerce or transportation, that it was not in navigation, and that it was not a Jones Act vessel. The Super Scoop does not transport passengers or cargo. Rather, it is a floating, anchored work platform with an affixed dredge that does nothing but remove sediment from the harbor floor and place it into scows. The Super Scoop does not have a navigation capacity and is not engaged in navigation. It is capable only of incidental and very limited positional movement based on manipulation of its anchors. Distance travel is possible only when the Super Scoop is pulled by tugboats. On those occasions, the Super Scoop is unmanned and has no cargo. The Petitioner worked aboard the Super Scoop only when it was anchored and dredging in the inland coastal waters of Boston Harbor. He lived ashore and was not aboard the Super Scoop when tugboats moved it. He was not exposed to the perils of the sea, and is properly viewed as a land-based worker.

II. Title 1 U.S.C. section 3 provides a definition of the term vessel for purposes of certain federal transportation statutes, but *not* for purposes of the Jones Act. The Court need not consider any argument to the contrary because no such argument was raised below.

Legislative history indicates that Congress did not intend the Jones Act to include a broad definition of the vessel concept like that appearing in section 3. Beyond legislative history, the fact that the Jones Act does not define "vessel" and that numerous other federal statutes contain different and varying definitions of the term indicates that 1 U.S.C. § 3 was not an established definition in 1920 when the Jones Act was promulgated, and was not meant to serve as the effective definition of

"vessel." In fact, the definition was unsettled even through 1927, when the LHWCA was enacted. The LHWCA includes its own, *different* definition of the term, so Congress could not have meant the LHWCA to supply a section 3-like definition for purposes of the Jones Act.

Beyond questions of congressional intent, 1 U.S.C. § 3 cannot realistically be construed as supplying a dispositive definition of "vessel" for Jones Act purposes because this Court already has *rejected* section 3's broad definition. Section 3 would bestow vessel status on virtually *any* float even *capable* of transportation over water. This Court clarified long ago that "vessel" was not so broad a concept, and that vessels had to be capable of "practical" transportation over water. Considering these factors, all available contextual clues, and the fact that section 3's definition is simply too broad as a matter of policy, and it is clear that section 3 does not define "vessel" for the Jones Act.

III. The First Circuit's *Stewart* decision was required by this Court's decisions. It does not ignore an applicable statutory definition of the term vessel, because there is no such definition. It does not violate the strictures of *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). *Chandris* addressed the concept of the Jones Act seaman, not the Jones Act vessel. In any event, the First Circuit's decision is consistent with *Chandris*. The decision below does not undermine the mutual exclusivity of the Jones Act and the LHWCA. The notion that the vessel concept must have the same definition for both the Jones Act and the LHWCA is wrong. There is no necessary logical or other requirement of such congruity, and the decisional law is to the contrary. The First Circuit did not incorrectly deny vessel status to dredges. This Court has *never* held that dredges are, as

such, Jones Act vessels, and the First Circuit's decision is based on principles rather than labels. The decision below is consistent with the requirement that the Jones Act protect only those who are subject to the perils of the sea, because the Petitioner was *not* exposed to the perils of the sea while working on the Super Scoop. The First Circuit did not overemphasize the vessel status of the Super Scoop.

ARGUMENT

I. The First Circuit's Decision Follows Naturally From This Court's Precedents.

A. This Court Has Never Held That Dredges Are Jones Act Vessels.

In his First Circuit brief, the Petitioner did *not* argue that this Court has held that work platforms like the Super Scoop are Jones Act vessels. In his petition for certiorari, the Petitioner admitted that "this Court has *never* addressed the vessel status requirement under the Jones Act. Indeed, it does not appear to have directly addressed the meaning of the term 'vessel' (in any context) since 1903." (Pet. for Cert. at 5; emphasis added) Since then, the plaintiff has changed course. He now argues that this Court already has decided that dredges are vessels. (Pet. br. at 27, 35) The Petitioner is wrong.

The Petitioner cites three decisions in support of this argument. The two earliest cases, *The Virginia Ehrman and The Agnese*, 97 U.S. 309 (1878) and *Ellis v. United States*, 206 U.S. 246 (1907), were decided years before the Jones Act was enacted. In *Virginia Ehrman*, the Court addressed issues of negligence and property damage.

Whether the float involved there was a vessel was not at issue. In *Ellis*, the question presented was the constitutionality of an 1892 criminal statute governing the number of hours that could be worked by "laborers and mechanics" employed on certain public works projects. *Id.* at 254-255. The Court held the statute constitutional. The Court then discussed certain "subordinate" matters, and noted that the dredging project at issue was not a public work and the workers were not laborers or mechanics. *Id.* at 256-260.[2]

In *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), the only post-Jones Act decision cited on this point by the Petitioner, the Court upheld a jury finding that the plaintiff was a Jones Act seaman, noting that the plaintiff had responsibility for navigation when the dredge moved. *Id.* at 373. The Court clarified the limits of its decision (and the fact that whether dredges were Jones Act vessels remained an open issue) by emphasizing that "no question has been raised at any time as to whether the dredge involved here had the status of a 'vessel' at the time of Petitioner's injury." 352 U.S. at 371 n.1. Three Justices dissented in *Senko*, and observed that a dredge was merely an "earth-removing machine" that floated and occasionally was pushed from one place to another. 352 U.S. at 378.

The Petitioner was right to concede in his Petition for Certiorari that the Jones Act status of dredge-equipped work platforms like the Super Scoop is unresolved. This

[2] Even in this pre-Jones Act era, the dicta by the *Ellis* majority was controversial. The dissent (Justices Moody, Harlan, and Day) strenuously argued that the dredges and scows there were not vessels and the workers on them were not seamen. *Id.* at 264-267.

Court is free to hold that the First Circuit correctly ruled that the Super Scoop is not a Jones Act vessel.

B. Relevant Jones Act and Related Principles

This Court has issued a number of decisions discussing the vessel concept and related issues that bear on the question presented in this case. These decisions create a framework of fundamental principles that shape the Jones Act vessel concept. A survey of these decisions and the principles they represent provides context for the decision of the First Circuit below.

In *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625 (1887), the plaintiff sought a salvage award after saving a dry-dock that had broken its moorings. He argued that an unsecured dry-dock was a vessel for purposes of his claim because it was capable of transportation over water. The Court said that "vessel" includes "all navigable structures intended for transportation," *id.* at 629, and that the dry-dock only floated and could not "practically" be used for navigation, transportation, or commerce. *Id.* at 627-630. The Court concluded: "We think no case can be found which would construe the terms [ship or vessel] to include a dry-dock, a floating-bridge, or meeting-house, permanently moored or attached to a wharf." *Id.* at 630.

In *The Robert W. Parsons*, 191 U.S. 17 (1903), the Court considered whether a canal boat that transported commercial goods and was pulled along the canal by horses walking on shore was a vessel subject to federal admiralty jurisdiction. The Court held that it was such a vessel. The important factors, said the Court, were the "purpose for which the craft [was] constructed and the business in which it [was] engaged." *Id.* at 30. The Court

held that the boat was a vessel in admiralty because it was engaged in "commerce and navigation." *Id.* at 31.

In *Evansville and Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926), the owner of a wharfboat brought a petition in admiralty seeking a limitation of liability as the "owner of a vessel." The float at issue there was used to store and transfer goods. It was secured by cables to the shore and had no means of self-propulsion. It was towed up river each winter to avoid the ice, but it had no transportation function. The Court held that it was not a vessel because it was not "practically capable of being used . . . [for] transportation." *Id.* at 22.

In *Warner v. Goltra*, 293 U.S. 155 (1934), the Court held that the master of a vessel is protected by the Jones Act no less than a crew member. Defining "seaman" the Court said:

> [A] seaman is a mariner of any degree, who lives his life on the sea. It is enough that what he does affects the operation and welfare of the ship when she is upon a voyage.

Id. at 157.

In *Norton v. Warner Co.*, 321 U.S. 565 (1944), the employee lived and worked upon a barge, helped to maintain it, and assisted in its movement. He had no shore responsibilities and did not handle cargo. The Court held that he was not entitled to LHWCA coverage as he was a permanent member of the barge's crew. The Court noted that vessel crew members are workers on board who are naturally and primarily engaged in navigation, and who contribute to the "operation and welfare of the ship when she is upon a voyage." *Id.* at 572-573.

In *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952), the plaintiff was engaged to operate a sightseeing motor boat but was injured before actually starting work, and at a time when the boats were ashore for repairs. The Court held that the plaintiff was not a Jones Act seaman, reasoning that he was injured while engaged in repair work of the sort typically done by shore-based workers: "The distinct nature of the work is emphasized by the fact that there was no vessel in navigation at the time of decedent's death. All had been laid up for the winter." *Id.* at 191.

In *Senko*, 352 U.S. 370, the plaintiff worked on a dredge anchored in a river. There was evidence that the plaintiff was to have significant navigation-related responsibilities once the dredge was engaged in transit. The jury found that the plaintiff was a Jones Act seaman, and this Court affirmed. As noted above, the *Senko* Court clarified that it was *not* deciding whether dredges are Jones Act vessels. *Id.* at 371 n.1. On that point the dissent argued that dredges are only "earth-removing machine[s]," and not vessels. *Id.* at 378.

In *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), the Court considered whether Jones Act claimants had to aid in the navigation of a vessel to qualify as seamen. The Court said that the aid-in-navigation requirement that had appeared in prior decisions was inapplicable, and that the employee's connection to a vessel, not his/her job, was dispositive.

> The key to seaman status is employment-related connection to a vessel in navigation. . . . [A] necessary element of the connection is that a seaman perform the work of a vessel. In this regard, we believe the requirement that an employee's

> duties must "contribut[e] to the function of the vessel or the accomplishment of its mission" captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.

Id. at 355 (citations omitted).

In *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), the Court focused on the type of relationship a worker must have to a vessel in order to achieve seaman status. The Court said that the Jones Act seaman inquiry is fundamentally "status based", in that workers who are seamen do not lose that status simply because they go ashore. *Id.* at 361. Accordingly, a maritime worker does not "oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured." *Id.* at 363. As to the connection to a vessel necessary for Jones Act seaman status, the Court said: (1) the employee's duties must "contribute to the function of the vessel or to the accomplishment of its mission"; and (2) the employee "must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Id.* at 368 (citation omitted). The purpose of the "substantial connection" requirement is to separate the sea-based, Jones Act employees from land-based workers who have only a "transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Id.*

Finally, the *Chandris* Court discussed the jury instructions to be given by the trial court following remand.

As part of this discussion, the Court quoted the First Circuit's *DiGiovanni* decision in support of the proposition that "[u]nder our precedent and the law prevailing in the Circuits, it is generally accepted that 'a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside. . . .'" *Id.* at 373-374 (citing 959 F.2d at 1121). Like *Wilander*, *Chandris* did not specifically discuss the definition of vessel.

In *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997), the Court revisited the issue of seaman status without discussing what constitutes a vessel. The focus of *Papai* was the connection a claimant needed with a fleet of vessels to qualify as a Jones Act seaman. The claimant Papai was a laborer who provided maintenance-type services through a local union. He worked on a short-term basis for different vessels performing various tasks while the vessels were docked. *Id.* at 553, 559. His work was not of a "seagoing nature." *Id.* at 560. The Court said:

> Jones Act coverage is confined to . . . those workers who face regular exposure to the perils of the sea. An important part of the test for determining who is a seaman is whether the . . . worker . . . has a substantial connection to a vessel or a fleet of vessels, and the latter concept requires a requisite degree of common ownership or control. * * * The only connection a reasonable jury could identify among the vessels Papai worked aboard is that each hired some of its employees from the same union hiring hall from which Papai was hired. That is not sufficient to establish seaman status under the group of vessels concept.

Id. The Court concluded that Papai's employer was entitled to summary judgment.

C. The First Circuit's Approach is Fully Informed By and Consistent With This Court's Opinions, and is Widely Followed.

1. The *DiGiovanni* and *Stewart* Decisions

The First Circuit's decision below is grounded in its 1992 decision in *DiGiovanni*, 959 F.2d at 1119, in which the court also addressed the question what is a vessel within the meaning of the Jones Act. A brief review of *DiGiovanni* is helpful to understanding of the *Stewart* decision below.

The *DiGiovanni* court summarized the essential facts as follows:

> The BETTY F was a barge, 100 feet in length, with a 40 foot beam and a raked bow and stern, and with nautical equipment, such as navigation and anchor lights. In all respects it met the commonly understood characteristics of a vessel, and, indeed, was inspected by the Coast Guard. It had no means of self-propulsion, except that positional movement could be achieved by manipulating its spud anchors. Its current use was to float at the Jamestown, Rhode Island, bridge, bearing a crane that was being used for bridge construction. Its permanent station was Davisville, Rhode Island, from which it was towed, by a tug, from time to time, to perform various shore jobs. It had been at the Jamestown bridge for a month. It was positioned about the bridge, and moved away from the pilings at night, to prevent damage.
>
> Plaintiff's principal duty was to handle a tag line to guide the crane, but he also did maintenance work, such as painting, and tended lines. Although he was attached to the BETTY F, at the time of his injury he was standing on the deck of a supply barge in order better to manipulate the line. Its deck proved to be slippery, and he fell. The supply barge was in general use to carry supplies, but also served as a work platform.

959 F.2d at 1120-1121.

From this recitation of the facts, the *DiGiovanni* court surveyed this Court's opinions discussing the Jones Act seaman concept and opinions from the other circuits – particularly the Fifth Circuit – addressing the term vessel. The court noted that the proper focus with regard to defining "vessel" was the use of the float in question, rather than its physical characteristics. From this premise, the court reasoned that, without regard to its particular characteristics, a float engaged in actual navigational operations was a Jones Act vessel. *Id.*

The *DiGiovanni* court relied on the Fifth Circuit's decision in *Bernard v. Binnings Constr. Co.*, 741 F.2d 824 (5th Cir. 1984), which articulated the following test for assessing whether a particular float was a vessel:

> The test is whether it was . . . used primarily for the transportation of cargo, equipment, or persons across navigable waters or was, at the time of [the plaintiffs] injuries engaged in navigation. . . . A structure whose purpose or primary business is *not* navigation or commerce across navigable waters may nonetheless satisfy the Jones Act vessel requirement if, at the time of the worker's injury, the structure was actually in navigation.

959 F.2d at 1123 (quoting *Bernard*, 741 F.2d at 829). Restating this test, the *DiGiovanni* court said:

> In sum, if a barge, or other float's 'purpose or primary purpose is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise ought to be considered seamen only when it is in actual navigation or transit.

Id.

In the *Stewart* decision below, the court summarized the facts bearing on the Petitioner's suit as follows:

> The Super Scoop is a large floating platform . . . equipped with a clam shell bucket. It operates as a dredge, removing silt from the ocean floor and dumping the sediment onto one of two scows that float alongside. Once the scows are full, tugboats tow them out to sea and dispose of the dredge material.
>
> Though largely stationary, the Super Scoop has navigation lights, ballast tanks, and a dining area for the crew. Crew members control the clam shell bucket by manipulating a tag-line cable attached to a counter weight. The Super Scoop is incapable of self-propulsion. Crew members use anchors and cables to achieve positional movement at near-glacial speeds. The Super Scoop typically moves once every two hours, covering a distance of 30-50 feet. Its scows also lack any means of self-propulsion. Tugboats normally are used to achieve movement. Alternatively, the dredge's crew drops a bucket from the dredge into one of the scow's hoppers; by manipulating the cables, the crew then swings the bucket so that it glides the scow around the dredge.

230 F.3d at 464.

Against the backdrop of these facts, the court reviewed *Chandris* and *Wilander* and this Court's requirement that a Jones Act seaman must have a connection to a "vessel in navigation." The court then restated the *DiGiovanni* holding that, if a barge or other float's "purpose or primary purpose is not navigation or commerce" then workers assigned to it are to be considered Jones Act seamen only when it is in actual navigation or transit. *Id.* at 467 (citing *Bernard*, 741 F.2d at 829).

Moving to the merits of the Petitioner's arguments, the court reasoned first that the Super Scoop was a "barge or other float" within the meaning of *DiGiovanni*. The court then rejected the Petitioner's argument that the Super Scoop qualified as a vessel because its "purpose or primary business" – dredging – constituted navigation or commerce within the meaning of *DiGiovanni*. As to this argument, the court reasoned as follows:

> This construct distorts the functional analysis that we endorsed in *DiGiovanni*. That analysis focuses on *primary* functions and, at bottom, dredging is primarily a form of construction. Any navigation or transportation that may be required is incidental to this primary function. In this respect, the only real distinction between the Super Scoop and the Betty F is that the former was being used in the construction of a cross-harbor tunnel while the latter was being used in the construction of an over-the-bay bridge. It does not help the appellant that both structures were moved with some regularity across navigable waters; even regular movement of a floating structure across navigable waters will not transform that structure into a vessel when that motion is incidental to the central purpose served by the structure. *See Bernard*, 741 F.2d at 830-831.

> Because both the Super Scoop and the Betty F were floating stages used primarily as extensions of the land for the purpose of securing heavy equipment to construct a passage across the sea, neither is a vessel in navigation within the jurisprudence of the Jones Act.

Id. at 468-469 (citing *Powers v. Bethlehem Steel Corp.*, 477 F.2d 643, 646 (1st Cir.), *cert. denied*, 414 U.S. 85 (1973)).

As to the Petitioner's argument that, even if the Super Scoop itself was not a vessel in navigation, scow number 4, on which the Petitioner was located at the time of his accident, *was* a Jones Act vessel because it was in actual transit at the time of the accident, the court said that the Petitioner was assigned to and part of the crew of the Super Scoop, *not* scow number 4. For that reason, and because the Super Scoop was not in motion at the time of the accident, the fact that the scow was moving was irrelevant. *Id.* at 469.

The court also rejected the argument that scow number 4 was part of a flotilla connected to the Super Scoop, which comprised a fleet of vessels. The court said:

> This asseveration misconstrues Supreme Court precedent. The Court has held that a plaintiff's relationship to a fleet of vessels, rather than to a particular ship, can establish the *connection* needed to confer seaman status. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 555-57 (1997); *Chandris*, 515 U.S. at 368. Here, however, the connection element is not an issue (Dutra has conceded the point). The common ownership of the dredge and scow has no probative force on the subjacent issue: whether the floating work

> station was – or was not – a vessel in navigation for Jones Act purposes.

Id. (citing *DiGiovanni*, 959 F.2d at 1124).

2. The *Stewart* Approach is Based On Principles Stated By This Court, and is Followed By Many Other Courts.

The First Circuit's decision is solidly grounded in the Jones Act and vessel principles articulated by this Court. To begin with, the decision is a direct doctrinal and spiritual descendent of fundamental vessel principles identified in the *Cope*, *Robert W. Parsons*, and *Evansville* cases. These authorities emphasize that vessel status depends on the subject float's *purpose and business*, that is, whether the float was engaged in commerce, navigation, or transportation. Consistent with this view, and following the lead of the Fifth Circuit in *Bernard*, the First Circuit looked past the physical attributes of the Super Scoop to its "primary purpose." Focusing on that factor, the court concluded that the Super Scoop was not a Jones Act vessel because its primary purpose was construction/dredging, *not* commerce, navigation, or transportation.

This was a correct conclusion in light of the cases. In its limited, construction-related function, the Super Scoop closely resembles the *Cope* dry-dock and the *Evansville* wharfboat, and contrasts with the canal boat in *Robert W. Parsons*, which was a pure instrument of commerce. In implicitly recognizing this distinction, the First Circuit decision followed the logic of the *Senko* dissent, which correctly pointed out that a dredge is nothing more than an earth-moving machine that occasionally is moved from place to place. 352 U.S. at 378. *Accord Ellis*, 206 U.S. at

264-267 (Moody, J. dissenting) (dredges and scows are not vessels; dredgemen and scowmen are not seamen).

The First Circuit's decision also respects the central importance of the transportation function to vessel analysis, as clarified in *Cope*, *Robert W. Parsons*, and *Evansville*. The Super Scoop is not engaged in transportation. When being moved by tugboats, the Super Scoop by regulation is *unmanned*, and it carries no cargo. It is not transporting, but is being *transported*. Because it carries no passengers or cargo when being moved, it has no commercial function. It has utility *only* when it is anchored and engaged in dredging. Of course, it does not in any sense transport its dredge. The Super Scoop *is* the dredge, with a work platform at its base. The dredge is a *permanent* fixture on the platform; it is not transported by the Super Scoop any more than a sailing ship transports its masts, or its decking, or the paint on its hull. A float not engaged in transportation cannot be a vessel.[3]

[3] *See* 1 Robert Force & Martin J. Norris, *The Law of Seamen*, § 2:15 at 2-70 (5th ed. 2003):

> Distinction is made between structures used for transportation purposes and those that serve merely as work platforms. Thus, the use made of a structure may undermine its capability of being an instrumentality of commerce, that is, it is not used for transporting goods, equipment, or passengers, but instead is used as a surface from which work is done. In these circumstances the structure functions more like land or a building than a vessel.

See also Manuel v. P.A.W. Drilling and Well Serv., Inc., 135 F.3d 344 (5th Cir. 1998) (traditionally, vessels transport passengers, cargo, or equipment from place to place across navigable waters). *See also infra* note 4.

Further, the First Circuit's decision is in line with the *Cope/Evansville* requirement that a vessel must be *practically* capable of transportation over water. Undeniably, the Super Scoop cannot meet the practical transportation standard. The Super Scoop is just a work platform surrounding a permanent dredge. It is anchored and virtually immobile unless moved by tugboats. It cannot by law carry people on those occasions, and, as an unsecure open platform, is of no practical utility in storing or moving goods. The Super Scoop is not even capable of performing its dedicated *dredging* functions unaided. It cannot store or carry the earth it dredges, so it needs scows; it and the scows require tugboats for effective movement. The Super Scoop has no more *practical* transportation capacity than the *Cope* dry-dock or the *Evansville* wharfboat.

The First Circuit's decision also adheres to the principle that vessel status and navigation go hand-in-hand. Whether discussing the attributes of seamen or of vessels, this Court has consistently returned to the important feature that is common to these related concepts – a vessel on its voyage, *in navigation*. *Chandris*, 515 U.S. at 355, 368; *Wilander*, 498 U.S. at 354-355; *Norton*, 321 U.S. at 571-573; *Warner*, 293 U.S. at 157; *Robert W. Parsons*, 191 U.S. at 31. The First Circuit took this requirement into account in holding that the primary purpose of the Super Scoop is dredging, *not* navigation. This was the right conclusion. A work platform that is attached to the harbor floor by four anchors, is incapable of self-propulsion, is unmanned when it is moved by tugboats, and is used only for removing material from the ocean floor is *never* engaged upon a "voyage" or capable of anything else that can

fairly be considered navigation.[4] This is particularly so here considering that, at the time of Petitioner's accident, the Super Scoop was out of service due to a mechanical problem with one of the scows. *Compare West v. United States*, 361 U.S. 118, 122 (1959) (during repairs vessel not in navigation); *Desper*, 342 U.S at 191 (laid up boat not in navigation). The First Circuit's decision honors the "in navigation" requirement.

In addition, the decision below is consonant with the Jones Act goal of protecting only those exposed to the perils of the sea. *E.g.*, *Papai*, 520 U.S. at 560; *Chandris*, 515 U.S. at 354-355. This is so because the Petitioner was *not* exposed to the perils of the sea. The Petitioner alleges that he was injured when he fell. Fall hazards exist everywhere (particularly in construction work) and certainly are not peculiar to the sea. The Petitioner's fall may be evidence that construction work can be perilous, but it says *nothing* about risks associated with the sea or navigation. The Super Scoop was an anchored, stationary, and inactive work platform when the Petitioner fell. It was not in navigation or even transit. The proximity of the harbor was coincidental.

[4] Navigation entails "transportation and commerce." Steven F. Friedell, 1 *Benedict on Admiralty*, § 18 (7th ed. 2003). *See also Norton*, 321 U.S. at 572 (navigation includes contributing to the "operation and welfare of the ship when she is upon a voyage"); *United States v. Utah*, 283 U.S. 64, 76 (1931) (navigation includes trade and travel); *The Silvia*, 171 U.S. 462, 466 (1898) (navigation includes control of a vessel, its equipment, and its cargo during a voyage); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 37 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) (vessel in navigation is "engaged as an instrument of commerce or transportation. . . ."); *McNeill v. J. E. Brenneman Co.*, 1986 A.M.C. 2241, 2249 (E.D. Pa. 1983) (barge's "incidental movement is to navigation what a bird's hopping around a cage is to flying.")

Further, the Petitioner lived in East Boston and commuted to work every day. He was assigned to the Super Scoop on a temporary basis and worked on it *only* when it was at anchor in the inland coastal waters of Boston Harbor. As such, the Petitioner faced none of the acknowledged perils of the open sea. *See* David W. Robertson, *A New Approach To Determining Seaman Status*, 64 TEXAS L. REV. 79, 79-80 (1985) (listing risks; hereinafter "Robertson"). There was no deep-water threat because the Petitioner was on a platform that was the functional equivalent of a dock. Wind and weather were no more of a threat to the Petitioner than to any land-based laborer in the vicinity of Boston Harbor. Tides and currents were no threat, as the Super Scoop was anchored and stationary while the Petitioner was on it. Ocean predators plainly were no threat to the Petitioner (he was at greater risk of suffering a dogbite outside his apartment). Nor was the Petitioner isolated or separated from "shore-side facilities for aid and succor." *Id.* He worked on a project closely supervised by interested parties and the government; he lived ashore and had the same access to "aid and succor" as anyone else.

In the circumstances, the Petitioner was in no real sense exposed to the perils of the sea. To hold otherwise is to render meaningless the distinction drawn by the *Chandris* Court between "sea-based" workers and "land-based" workers who have only "transitory or sporadic connection to a vessel in navigation, and . . . whose employment does not regularly expose them to the perils of the sea." 515 U.S. at 363. *See also Papai*, 520 U.S. at 555, 560.

In sum, the First Circuit's "primary purpose" approach to vessel status under the Jones Act is in complete accord with this Court's vessel/seaman jurisprudence. For

this reason this Court cited *DiGiovanni* with approval in *Chandris* (515 U.S. at 373), and a strong movement of lower courts has adopted the First Circuit's approach. *See Hatch v. Durocher Dock and Dredge, Inc.*, 33 F.3d 545, 548 (6th Cir. 1994); *Kathriner v. Unisea, Inc.*, 975 F.2d 657, 661 (9th Cir. 1992); *Gipson v. Kajima Eng. & Const., Inc.*, 972 F. Supp. 537, 542 (C.D. Cal. 1997), *aff'd.*, 173 F.3d 860 (9th Cir.), *cert. denied*, 528 U.S. 815 (1999); *Ketzel v. Mississippi Riverboat Amusement, Ltd.*, 867 F. Supp. 1260, 1263-64 (S.D. Miss. 1994); *Taylor v. Cooper River Const.*, 830 F. Supp. 300, 302-304 (D.S.C. 1993); *Newsom v. Continental Grain Co.*, 820 F. Supp. 1187, 1189 (D. Minn. 1993); *Johnson v. ADM/Growmark River Sys., Inc.*, 295 Ill. App. 3d 436, 442-44, 693 N.E.2d 447, 480-82 (Ill. App. 1998); *Leggett v. Sovran Leasing Corp.*, 909 S.W.2d 664, 665-67 (Mo. 1995); *Spears v. Kajima Eng. & Const'n, Inc.*, 101 Cal. App. 4th 466, 475-78 (2002); *Gault v. Modern Continental/Roadway Const'n Co.*, 100 Cal. App. 4th 991, 1000-1002 (2002).

II. 1 U.S.C. § 3 Clearly Does Not Provide A Controlling Definition of The Term Vessel.

A. This Court Need Not Consider This Contention Because it Was Not Raised Below.

The Petitioner's primary argument here is that this Court must hold that the Super Scoop is a Jones Act vessel because it falls within the definition of "vessel" at 1 U.S.C. § 3, and that definition is controlling for Jones Act purposes. (Pet. br. at 10-30)[5] As noted above, the Petitioner is

[5] Title 1 U.S.C. section 3 provides: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

a recent convert to this argument; he *conceded* before the District Court and the First Circuit that section 3 did *not* define "vessel" for Jones Act purposes, and he did not even make his current section 3 argument in his Petition for Certiorari. (C.A. App. 219; Pet. C.A. br. at 19) As such, neither the District Court nor the First Circuit had a chance to consider or discuss this point. This is not an ideal context for review by this Court. In the circumstances, this argument need not even be considered. *E.g.*, *Chandris*, 515 U.S. at 353 n.*; *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984); *United States v. Estate of Donnelly*, 397 U.S. 286, 295 n.5 (1970); Sup. Ct. Rules 14.1(a), 24.1(a).

B. Legislative History Demonstrates That Congress Meant To Reject Broad Definitions of "Vessel," Like Section 3, for Purposes of the Jones Act.

In 1915, in an effort to give seamen the right to sue in negligence (among other things), Congress enacted An Act to Promote the Welfare of American Seamen in the Merchant Marine of the United States, to Abolish Arrest and Imprisonment as a Penalty for Desertion and to Secure the Abrogation of Treaty Provisions in Relation Thereto, and to Promote Safety at Sea. Act of March 4, 1915, ch. 153, §§ 1-20, 38 Stat. 1164-85 ("Act of 1915"). Section 20 of the Act of 1915 created a right of recovery for injuries suffered on a vessel, and limited the effect of the fellow-servant defense. *Wilander*, 498 U.S. at 341-342.

The Act of 1915 was amended by the Act of June 5, 1920. Act of June 5, 1920, ch. 250, §§ 1-39, 41 Stat. 988-1008 (codified at 46 U.S.C. app. § 688) ("Act of 1920"). The Act of 1920 provided that the term vessel should have the

meaning assigned by sections 1 and 2 of the Shipping Act of 1916, as amended. Act of June 5, 1920, ch. 250, § 37. The Shipping Act defined "vessel" as:

> All watercraft and artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or intended to be used as a means of transportation on water.

Act of September 7, 1916, ch. 451, § 44, 39 Stat. 728. "[L]awmakers amended section 20 of the Act of 1915 by substituting section 33 of the Act of 1920." *Warner*, 293 U.S. at 159. Section 33, of course, is what is now known as the Jones Act. Section 33 did *not* include its own definition of vessel and did *not* incorporate the term's definition from the Act of 1920 or elsewhere. Thus, the Jones Act became law without a definition of vessel.

By amending section 20 of the Act of 1915 by way of section 33 of the Act of 1920, Congress effectively *deleted* from the Jones Act the broad definition of vessel incorporated into the Act of 1920. This choice by Congress is properly considered as evidence of its intentions with respect to the Jones Act. *E.g.*, *Board of County Commissioners v. Seber*, 318 U.S. 705, 711 n.10 (1943); *Spring City Foundry Co. v. Commissioner of Internal Revenue*, 292 U.S. 182, 187 (1934); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913). Congress' deletion of an expansive vessel definition from the Jones Act indicates: (1) its desire that the Jones Act *not* contain a specific definition of the vessel concept; and (2) its rejection of a broad definition describing a vessel as any watercraft or contrivance capable of transportation on water. As that broad language is the heart of the definition appearing in 1 U.S.C. § 3, the

history of the Jones Act demonstrates that Congress did *not* intend that that definition, or any definition like it, be part of the Jones Act.

C. Beyond Legislative History, Congress' Treatment of the Term Vessel in the Jones Act And Other Statutes Implies That 1 U.S.C. § 3 was Not Meant to Supply a Dispositive Jones Act Definition.

As the Petitioner acknowledges, many federal statutes, including at least one as old as the Jones Act, define the term "vessel" in various contexts. (Pet. br. at 19 n.5 (citing Merchant Marine Act of 1920, 46 U.S.C. App. § 801; International Regulations of Preventing Collisions at Sea Act, 33 U.S.C. § 1601(1); Inland Navigation Rules Act of 1980, 33 U.S.C. § 2003(a); Whaling Convention Act, 16 U.S.C. § 916(e); Oil Pollution Act of 1990, 33 U.S.C. § 2701(37); Federal Water Pollution Control Act, 33 U.S.C. § 1321(a)(3); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601(28); Public Health Service Act, 42 U.S.C. § 201(i); Contraband Seizure Act, 49 U.S.C. § 80301(3); Tariff Act of 1930, 19 U.S.C. § 1401(a); Interstate Act Against Importation of Motor Vehicles, Vessels and Aircraft, 18 U.S.C. § 533(c)(3); Excise Taxes Act, 26 U.S.C. § 5688(c); Neutrality Act of 1939, 22 U.S.C. § 456(c); Interstate Commerce Act, 49 U.S.C. § 13102(23) (Supp. 2003); Communications Act of 1934, 47 U.S.C. § 153(39)(A); Sentencing Reform Act, 18 U.S.C. § 3667; Anti-Fouling Paint Control Act of 1988, 33 U.S.C. § 2402(11); Deepwater Ports Act, 33 U.S.C. § 1502(19), Submarine Cables Act, 47 U.S.C. § 30; Federal Ship Mortgage Insurance Act, 46 U.S.C. App. § 1271(b); Anti-Gambling Act, 18 U.S.C. § 1081.)) In the Shipping Act,

Congress expressly incorporated section 3. 46 U.S.C. § 2101(45).

These statutes are significant for two reasons. First, they demonstrate that, for as long as the Jones Act has been in force, Congress has: (1) included in statutes integrated definitions of the term vessel where it believed that a legislative definition of that term was necessary; and (2) expressly incorporated 1 U.S.C. § 3's provisions where it considered that appropriate. In light of this practice, apart from the legislative history of the Jones Act, Congress's decision *not* to include an integrated definition of the term vessel in the Jones Act and *not* to incorporate section 3 into the Jones Act indicates an intention that section 3 was *not* controlling, and that the vessel concept for Jones Act purposes was to be developed *judicially*. *See also Chandris*, 515 U.S. at 355 ("Jones Act . . . leaves to the courts the determination of exactly which maritime workers are entitled to admiralty's special protection."); Steven F. Friedell, 1B *Benedict on Admiralty*, § 11A (7th ed. 2003).

Second, the statutes do not uniformly define "vessel", and the different definitions are not identical to that provided in section 3. *See generally* Martin J. Norris, *The Law of Maritime Personal Injuries* (4th ed. 2003) (discussing varying definitions given "seaman" and "vessel"). The Petitioner suggests that the definitions are close enough to the section 3 concept to amount to Congressional vouching for the broad applicability of section 3 (Pet. br. at 19); but this is exactly backwards. If anything, the diversity of definition as to this concept indicates that section 3 is *anything but* an essential, fundamental definition. The variety of legislation and the fact that Congress did not incorporate section 3 or another definition of vessel in the

Jones Act demonstrates that the vessel concept is elusive and defies simple, definitive explication. This evidence militates *against* the notion that Congress intended 1 U.S.C. § 3 to have broad application, and in favor of natural judicial evolution of the definition. *See Chandris*, 515 U.S. at 355.

D. Congress Could Not Have Intended to Follow Section 3 When it Enacted the Longshore and Harbor Workers Compensation Act.

The Petitioner contends that, with regard to defining the term vessel, Congress had section 3 in mind in 1927 when it referred to "master or member of a crew of any vessel" in the newly enacted LHWCA. According to the Petitioner, section 3's definition of "vessel" was well established in 1927, so Congress must have meant for it to define the term "vessel" as used in the LHWCA. (Pet. br. at 11-16) The Petitioner is wrong.

As a threshold matter, it bears mention that the Petitioner requested a writ of certiorari on the ground that the Jones Act's vessel requirement "remains unclear," that the Circuits are in disarray as to the issue, and that guidance is "urgently" and "demonstrably" required. (Pet. for Cert. at 5-6) Needless to say, if the definition of "vessel" is unclear *now*, it can hardly have been well established seventy-seven years ago.

In fact, the definitions of the intertwined vessel/seaman concepts were by *no means* well established in 1927. Prior to 1920, "the courts had not provided any clear definition" of seaman. Robertson, 64 TEXAS L. REV. at 85. The Jones Act became law in 1920; it defines neither

seaman nor vessel, and does not incorporate 1 U.S.C. § 3 or, as described above, the definition of "vessel" from the Act of 1920 of which the Jones Act was a part. After 1920, the Court defined seaman expansively to include longshoremen who happened to be injured on water. Robertson, 64 TEXAS L. REV. at 85 (citing *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926)). In 1927, Congress effectively overruled the *Haverty* approach to seaman status by enacting the LHWCA.

The new LHWCA clarified that, contrary to *Haverty* and related decisions, longshoremen who were not part of a vessel's crew were *not* Jones Act seamen, but were LHWCA longshoremen. *Id. See also* Pet. br. at 11. Like the Jones Act, the LHWCA did not incorporate 1 U.S.C. § 3. Instead, it included a definition of "vessel" that was *unlike* section 3 and that applied "[u]nless the context requires otherwise." 33 U.S.C. § 902(21). Thus, in 1927 the definition of the term vessel not only was *not* well established, it had just been effectively *revised* by a definition that was expressly subject to considerations of context.

Moreover, this Court's working definition of "vessel" in 1927 *differed* from section 3's definition. As described below, between 1887 and 1926 this Court *repeatedly* held that a float that was not "practically" capable of water transportation was not a vessel. *See Evansville*, 271 U.S. 19; *Cope*, 119 U.S. 625. Early opinions also linked vessel status to commerce. *See id.*; *Robert W. Parsons*, 191 U.S. at 30-31. These features make for a much *narrower* definition of "vessel" than section 3's definition, and the primacy of the narrower concept in the decisions confirms that section 3 was *far* from clearly established. In this context, there is no reasonable basis on which to say that Congress in 1927

intended that section 3 define the term for Jones Act purposes.[6]

E. The Notion that 1 U.S.C. § 3 Supplies a Dispositive Definition of "Vessel" For the Jones Act is Inconsistent With This Court's Decisions.

If this Court adopts section 3 as the governing definition of the term vessel for Jones Act purposes, it will effectively overrule prior decisions. This is so because, as the Petitioner concedes (Pet. br. at 21), in its prior treatment of the vessel concept under section 3, this Court has *rejected* the broad scope of section 3 and clarified that the appropriate definition of "vessel" is *narrower* than section 3's definition.

In *Evansville*, 271 U.S. 19, the Court denied a wharfboat owner's petition seeking relief under a statute limiting the liability of "the owner of any vessel." The boat was

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[6] The lower court decisions cited in the Petitioner's brief (page 16 n.4) are immaterial here. The decisions are inconsistent at least with *Evansville* and *Cope*, and this inconsistency contradicts the notion that section 3 stated a clearly established definition. Indeed, in the lower courts in general, section 3's definition of vessel "has not been very influential in admiralty and maritime cases. **** When courts mention the definition favorably, it usually seems to be a makeweight argument." David W. Robertson, Steven F. Friedell, and Michael F. Sturley, *Admiralty and Maritime Law in the United States*, 59 (Carolina Acad. Press 2001) (hereinafter "Robertson and Sturley"). *See* Brief of the Amicus United Brotherhood of Carpenters and Joiners at 12 ("The lower courts have developed a gaggle of conflicting vessel definitions."). *See also Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 359 (5th Cir. 1999), *cert. denied*, 588 U.S. 1155 (2000) (implicitly rejecting broad, section 3-like definition of vessel; anchored float that had limited movement but theoretical transportation capacity not a vessel); *Burchett v. Cargill*, 48 F.3d 173, 177-178 (5th Cir. 1995) (same).

secured to the shore by cables. It was towed annually up river for winter, but otherwise was not engaged in transportation. *Id.* at 20-21. When it sank and damaged the claimants' merchandise, the owner argued that it was a section 3 vessel because it was capable of water transportation.

Given the opportunity to adopt section 3 as the definition of "vessel" for purposes of the claim at issue there, the Court in effect said *No*. Instead, the Court ruled that the float there was not a vessel because it was not "*practically* capable of being used as a means of transportation." *Id.* at 22 (emphasis added). In this way, the Court implicitly rejected section 3 as overbroad, and, at least in that context, introduced a requirement of *practical* water transportation that is not part of section 3. This Court must overrule *Evansville* and discard its practicality dimension if it is to adopt section 3 now.

In *Cope*, 119 U.S. 625, discussed above, the Court rejected the argument that an unsecured dry-dock was a vessel because it was capable of being used as a means of transportation. The Court reasoned that, when in use, the dry-dock did not move horizontally over the water, but only floated on it, and therefore "could not be *practically* used" for navigation or transportation. *Id.* at 627-630 (emphasis added). If this Court reads section 3's definition of "vessel" into the Jones Act as the Petitioner proposes, it will effectively reverse *Cope*.

F. 1 U.S.C. § 3 Does Not Apply in This Context.

Section 1 of the Dictionary Act provides as a preface that the Act's provisions apply "[i]n determining the

meaning of any Act of Congress, unless the context indicates otherwise. . . . " 1 U.S.C. § 1. The Petitioner argues half-heartedly that the "context indicates otherwise" proviso may not apply to section 3 (Pet. br. at 17), but there is nothing to this argument. All of the statute's sections combine to provide general rules of construction and usage as to other sections, and must be read together as a unified whole. *E.g.*, *Stafford v. Briggs*, 444 U.S. 527, 535 (1980); *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972); *Markham v. Cabell*, 326 U.S. 404, 410-411 (1945). Even the legislative authority cited by the Petitioner supports the view that the "context indicates otherwise" phrase applies to section 3. (Pet. br. at 18 (quoting legislative report suggesting that the "vessel" definition *is* subject to considerations of context)). *See also* Robertson and Sturley at 59 ("But on the vessel issue . . . [a]ll we know is that the definitional criteria will probably vary contextually.").

So context must be considered. And the contextual clues strongly indicate that section 3's definition of vessel does *not* apply to the Jones Act. To begin with, as discussed above, Congress' effective *deletion* of a broad, section 3-like definition from the Jones Act and this Court's prior decisions suggest that 1 U.S.C. § 3's definition is *too* broad.

Furthermore, the Court has said that section 3 applies only to a limited class of statutes that does *not* include the Jones Act. In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), the Court addressed the vessel concept in considering whether questions arising from a collision of pleasure boats were cognizable in admiralty. The Court indicated that section 3 applied only to shipping and transportation statutes, saying:

> Congress defines the term "vessel," for the purpose of determining the scope of various shipping and maritime transportation laws, to include all types of waterborne vessels, without regard to whether they engage in commercial activity. *See, e.g.*, 1 U.S.C. § 3.

457 U.S. at 676.

Moreover, as described above, Congress intentionally did not define "vessel" within the Jones Act itself and did not incorporate section 3's definition into the Jones Act, even though in many other statutes implicating the vessel concept it did one or the other. *See Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993) ("context" means text of statute at issue or related statutes). Context confirms that section 3 is inapplicable here.

G. 1 U.S.C. § 3's Definition of "Vessel" is Undesirably Broad.

Beyond the fact that section 3's definition of "vessel" is at odds with this Court's decisions requiring that a vessel be *practically* capable of water transportation, section 3 is undesirably broad as a matter of policy. Under section 3, virtually *any* structure that floats and can theoretically be moved over water with cargo or passengers is a Jones Act vessel. Use of this definition would enormously expand the class of Jones Act vessels. In this approach, the unmoored dry-dock in *Cope* is a Jones Act vessel; the wharfboat in *Evansville* is a Jones Act vessel; the sightseeing boats under repair in *Desper* are Jones Act vessels; floating casinos while docked and anchored are Jones Act vessels; floating bridges are Jones Act vessels; and all (or nearly all) of the work platforms typically considered non-vessels are Jones Act vessels.[7]

Adoption of this standard will cause: (1) an extraordinary enlargement of the class of claimants entitled to the Jones Act's special protections well beyond those claimants reasonably and as a matter of common sense exposed to the perils of the sea; (2) an increase in problematic litigation as undeserving and marginal claimants seek to bring their claims within the Jones Act's newly extended limits; and (3) confusion and an increase in "vessel" – related litigation under the Jones Act and other admiralty/maritime statutes as litigants and courts sort out what a redefinition of "vessel" means.

The Petitioner recognizes the overbreadth of section 3, and says this need not be a problem because the gloss on section 3 from *Evansville* and *Cope* confines sections 3's definition to floats that are "practically capable" of transportation on water. (Pet. br. at 21-23) But this argument undercuts the Petitioner's very premise – that Congress through section 3 already has defined "vessel" for Jones Act purposes – and begs the question why the Court should read into the Jones Act an admittedly flawed,

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[7] As one treatise writer said about section 3:

> [1 U.S.C. § 3] may apply in certain circumstances, for example, in determining whether a contract is a maritime contract or whether or not a person has a maritime lien against a particular structure. In fact, the broad statutory definition coupled with the likewise broad definition of the term 'seaman' prompted the late Judge Brown to remark that even the 'three men in a tub' could qualify as Jones Act seamen.

1 Robert Force & Martin J. Norris, *The Law of Seamen*, § 2:11, p. 2-70 (5th ed. 2003) (citing *Burks v. American River Trans. Co.*, 679 F.2d 69 (5th Cir. 1982))

overinclusive definition that requires judicial modification to be useful. In truth, the Petitioner essentially concedes that section 3 clashes with years of this Court's decisions.

III. THE PETITIONER'S CRITICISM OF THE FIRST CIRCUIT'S DECISION IS *UNFOUNDED.*

The Petitioner makes a number of miscellaneous arguments challenging the decision below as flawed. (Pet. br. at 32-37) All are meritless.

First, the Petitioner says that the First Circuit impermissibly ignored the "applicable statutory definition" of vessel. (Pet. br. at 32) The First Circuit did no such thing. As explained in detail above, *there is no applicable statutory definition*. *See Chandris*, 515 U.S. at 355. The First Circuit properly synthesized and followed precedent and held that the Super Scoop was not a Jones Act vessel. The court ignored nothing.

Second, the plaintiff contends that the decision below violates what the plaintiff refers to as the "*Chandris* Court's anti-snapshot rule," even going so far as to suggest that *Chandris overruled* the First Circuit's decision in *DiGiovanni*. (Pet. br. at 33-34) The Petitioner misstates the import of *Chandris* and misreads the First Circuit's decision. In *Chandris*, the Court did not say what a Jones Act vessel was, but addressed the relationship that a worker must have with a vessel to qualify as a Jones Act seaman. In the decision below, the First Circuit considered the *entirely different* question whether a floating work platform that supports a crane or dredge and is not capable of navigation is a Jones Act vessel. *Chandris* and the decision below thus address *different* facets of the Jones Act. To the extent that *Chandris* and the First Circuit's

decision in *DiGiovanni* may overlap, they are consistent. Indeed, as noted above, *Chandris* cited and quoted with approval a portion of the *DiGiovanni* opinion. 515 U.S. at 373.

Nor can the First Circuit's "primary purpose" approach reasonably be characterized as a "snapshot test." In *DiGiovanni* and the decision below, the First Circuit looked at the "purpose or primary business" of the floats at issue, and particularly at whether the float's business is navigation or commerce. This standard draws directly on this Court's primary vessel authorities. *E.g.*, *Cope*, 119 U.S. 625; *Robert W. Parsons*, 191 U.S. 17; *Evansville*, 271 U.S. 19. *See also Bernard*, 741 F.2d at 829. There is no "snapshot" quality to this approach, just a clear-eyed assessment of what the float at issue is, and what it is not. Under the "primary purpose" approach, a long list of nontraditional vessels can qualify as Jones Act vessels so long as they are primarily engaged in commercial transportation of cargo or passengers on navigable waters. The Petitioner's suggestions to the contrary are specious.

The First Circuit's standard does have a kind of "second bite" feature, in that it can result in Jones Act vessel status for floats that otherwise are nonvessels when they are, in fact, in actual navigation or transit at the time of injury. It is inaccurate and unfair to characterize this feature as a snapshot test in violation of *Chandris*. In fact, it represents a *generous addition to* the Court's "primary purpose" analysis that can humanely enlarge the vessel concept for the benefit of some Jones Act claimants, and that accords with this Court's statements. *See Senko*, 352 U.S. at 371 n.1 (no issue as to dredge's status "at the time of petitioner's injury"); *Desper*, 342 U.S. at 190-191 ("[T]here was no vessel engaged in navigation at the time

of the decedent's death."). *See also DiGiovanni*, 959 F.2d at 1123 (citing *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971) for proposition that "varying status designation . . . is not a novel concept").

Third, the Petitioner argues that the two decisions issued by the First Circuit undermine the mutual exclusivity of the Jones Act and the LHWCA because the first decision held that the Super Scoop was *not* a Jones Act vessel, while the second decision said that the Super Scoop *was* an LHWCA vessel. (Pet. br. at 34) There are two significant problems with this argument. The first problem is that the Petitioner *has not requested review of the second decision*, so its propriety in all its aspects is irrelevant. *See* Pet. For Cert. at 1, 4.

The second problem is that the Petitioner is wrong; the term vessel need *not* have the same definition under both statutes. By comparison with the Jones Act, "vessel" for LHWCA purposes is broadly defined. *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 607 (1st Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997); *Kathriner*, 975 F.2d at 659-663; *see McCarthy v. The Bark Peking*, 716 F.2d 130, 134 & n.2 (2d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984) (noting established view that vessel is defined differently for Jones Act and LHWCA). Moreover, in general, the terms seaman and vessel can properly have variable meanings depending on the particular statutes in which they appear. *See* Martin J. Norris, *The Law of Maritime Personal Injuries*, Ch. 4 (5th ed. 2003). *Compare Dole v. Petroleum Treaters, Inc.*, 876 F.2d 518, 520-524 (5th Cir. 1989) (employee may be a non-seaman under the Fair Labor Standards Act but a seaman under the Jones Act); *Presley v. The Vessel Caribbean Seal*, 709 F.2d 406, 408-409 (5th Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984)

(scientists were seamen under general maritime law but not under the Jones Act; research ship was not a Jones Act vessel but was a vessel for other purposes). There is no requirement of or need for consistency here.

Fourth, the Petitioner argues that the First Circuit's rule incorrectly denies vessel status to dredges, and therefore is inconsistent with this court's decisions in *Ellis*, *Senko*, and *The Virginia Ehrman and The Agnese*. (Pet. br. at 35-36) As discussed above, *none* of these decisions holds that dredges are vessels within the meaning of the Jones Act; in fact, this Court *never* has held as such. Rather, this Court has identified a series of principles bearing on the vessel/seaman concept that, applied to the undisputed facts of this case, require the conclusion that the Super Scoop here is not a Jones Act vessel as a matter of law.

Fifth, the Petitioner argues that the First Circuit's decision is inconsistent with the Jones Act's goal of protecting workers who face the perils of the sea. (Pet. br. at 36-37) As explained above, the Petitioner manifestly was *not* exposed to the perils of the sea, and the First Circuit's decision is entirely congruent with the Jones Act. Moreover, even if the Petitioner in some theoretical sense was exposed to sea-related perils, it does not follow simply from that that the Super Scoop is a Jones Act vessel. The Super Scoop is a work platform anchored to the harbor floor. It is immobile and fixed when work is being conducted. In the circumstances, sea-related risks notwithstanding, it *still* cannot properly be considered a vessel. *See* Robertson, 64 TEXAS L. REV. at 102 ("If the facts suggest no significant possibility of work aboard the structure while in motion, the outcome has generally been

a determination against vessel status as a matter of law."; citing cases). *See also Cope*, 119 U.S. at 630.

Sixth, the Petitioner argues that the First Circuit overemphasized the vessel status of the Super Scoop. (Pet. br. at 37) It is not clear what the Petitioner means by this argument. The case presented the First Circuit with a discrete question, and the court answered it. Issues unrelated to the Super Scoop's vessel status were not before the court. The court was not required to discuss at length the relationship between its approach to the vessel issue and its views as to other seaman-related issues not presented. There is no undue emphasis in the First Circuit's decision. This argument is a makeweight.

CONCLUSION

The First Circuit's decision should be affirmed.

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WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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ARGUMENT

The parties agree that the Jones Act's remedies extend to "seamen" as the term was generally understood when the Act was passed in 1920, and that Congress implicitly defined the term "seaman" in the 1927 LHWCA as "a master or member of a crew of any *vessel*." Although not specifically defined in either statute, the term "vessel" should also be construed according to Congress's contemporary understanding. Under that understanding, reflected in 1 U.S.C. § 3 and the decisions of this Court and the lower courts, the *Super Scoop* was undoubtedly a "vessel."

I. Congress has explicitly defined the term "vessel" for Jones Act purposes in 1 U.S.C. § 3

Stewart has consistently maintained that the *Super Scoop* is a Jones Act "vessel" and has suggested 1 U.S.C. § 3 as an appropriate test for vessel status at every stage of this case.[1] Dutra's repeated assertions that Stewart has

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[1] Dutra devotes major portions of its brief to its assertion that Stewart waived reliance on 1 U.S.C. § 3. In fact, Stewart urged the section 3 definition of "vessel" on both lower courts. Responding to Dutra's summary judgment motion in the district court, Stewart cited *Norton v. Warner Co.*, 321 U.S. 565 (1944), in which this Court relied centrally on 1 U.S.C. § 3 for the conclusion that a harbor barge is a "vessel," *see* 321 U.S. at 571 & n.4, and quoted *Early v. American Dredging Co.*, 101 F. Supp. 393, 395 (E.D. Pa. 1951) ("There can be no doubt that the dredge is a vessel. 'Vessel' is defined in R.S. § 3, 1 U.S.C. § 3, to include 'every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.'"). C.A. App. 75. *See also, e.g.*, C.A. App. 190 (relying on *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (CA5 1998) (placing 1 U.S.C. § 3 at the center of the discussion of Jones Act vessel status, *see* 135 F.3d at 347); C.A. App. 194 (relying on *Brinegar v. San Ore Constr. Co.*, 302 F. Supp. 630 (E.D. Ark. 1969) (ruling that a dredge worker was a Jones Act seaman as a matter of law and applying 1 U.S.C. § 3, *see* 302 F. Supp. at 639)).

In his district court motion for rehearing, Stewart explicitly argued:

> There are statutes that define "vessel" generally. "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

C.A. App. 219 (quoting 1 U.S.C. § 3).

(Continued on following page)

"conceded," Resp. Br. 1, 2, 3, 10, 27, 33, 38, "acknowledged," *id.* at 1, 2, or "admitted," *id.* at 9, the inapplicability of the section 3 definition are simply wrong.[2] Dutra's substantive criticisms of section 3 are also unpersuasive. And the alternative tests proposed by Dutra's supporting amici should be rejected.

A. Congress did not reject the 1 U.S.C. § 3 "vessel" definition when it enacted the Jones Act

Dutra asserts that when Congress passed the Jones Act it "effectively *deleted*" any "broad" vessel definition (including 1 U.S.C. § 3) because section 20 of the 1920 Merchant Marine Act (which constitutes the Jones Act) did not specifically incorporate the broad definition that applies to other parts of the 1920 Act. Resp. Br. 27-29. This makes no sense.

Most significantly, the 1920 provision known as the Jones Act does not contain the term "vessel," and thus the 1920 Congress would have perceived no need to define it. The term "vessel" did not enter Jones Act jurisprudence until 1927, when Congress used the LHWCA phrase "master or member of a crew of any vessel" to delineate the mutually exclusive coverages of the two Acts. *See* Pet. Br. 3, 11-12. Nothing can be read into the 1920 Congress's failure to incorporate a specific definition of a term that does not appear in the statute.

In the court of appeals, Stewart again raised section 3. His first brief repeated the passage just quoted from the district court motion for rehearing. C.A. Br. 18-19. He proceeded to urge the plausibility of Judge Torruella's *DiGiovanni* dissent – which rested centrally on 1 U.S.C. § 3, *see* 959 F.2d at 1124-25, 1128, 1129-31 – and to quote *Benedict on Admiralty* for the proposition that section 3 codifies the accepted general maritime law's definition. Stewart's petition for initial hearing en banc (submitted prior to panel argument) strenuously urged the First Circuit to jettison *DiGiovanni* and adopt 1 U.S.C. § 3. *See* C.A. Pet. 23-26.

[2] Dutra provides no intelligible citation in support of any of these assertions. Most of its citations reflect nothing more than Stewart's recognition that the Jones Act does not specifically incorporate 1 U.S.C. § 3. The rest are completely irrelevant.

Moreover, even if Dutra were correct that the 1920 Congress made a deliberate choice not to use the Shipping Act definition of the term "vessel"[3] in the Jones Act, the conclusion that 1 U.S.C. § 3 was somehow also made inapplicable would not follow. Dutra overlooks the crucial fact that the Shipping Act definition of "vessel" is broader than the 1 U.S.C. § 3 definition in including ships under construction that have not yet been launched. Such ships would not have crews, so if Congress did reject the broader definition, it probably did so because it did not think the Jones Act required this expansion of the traditional maritime law's concept of a vessel. *See, e.g., Tucker v. Alexandroff*, 183 U.S. 424, 438 (1902) (explaining that a craft under construction does not qualify as a "vessel" under maritime law until it has been launched). Most importantly, any decision by Congress to reject the broad Shipping Act definition in the Jones Act context would have left section 3's narrower default definition fully in place.

B. Dutra misreads the Rules of Construction Act, the Jones Act, and the 1927 LHWCA

Dutra attempts a double distortion when it asserts that 1 U.S.C. § 3 defines *vessel* "for purposes of certain federal transportation statutes, but *not* for purposes of the Jones Act." Resp. Br. 7 (emphasis in original).[4] First,

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[3] Dutra misquotes and miscites the Shipping Act definition. As enacted in 1916, the Act did not define "vessel." *See* Shipping Act, 1916, ch. 451, §§ 1-2, 39 Stat. 728-29 (1916). (The Act has no section 44. *Cf.* Resp. Br. 28.) Two years later, section 1 was amended to provide:

> *The term "vessel" includes* all water craft and *other* artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or *are* intended to be used as a means of transportation on water.

Shipping Act, 1918, ch. 152, § 1, 40 Stat. 900 (1918) (emphasis added to indicate omissions from Dutra's quotation, Resp. Br. 28).

[4] Amicus Signal makes a similar mistake in claiming that section 3 is an admiralty jurisdiction statute. *See* Signal Br. 7 & n.11. Nothing about the statute limits it to the admiralty jurisdiction context, and this

(Continued on following page)

Dutra's inventive limitation of the section 3 definition to "certain federal transportation statutes" is contradicted by the wording of section 1 of the Rules of Construction Act, which makes the Act's definitions applicable "in determining the meaning of *any* Act of Congress, unless the context indicates otherwise."[5] 1 U.S.C. § 1 (emphasis supplied). Second, Dutra's indirect and completely unsupported implication that the Jones Act is not a "transportation statute" is utterly wrong. The Jones Act is Congress's "[f]oremost . . . enactment[] in the field of maritime torts." *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994). It was enacted pursuant to Congress's constitutional authority over the "entire subject" of "the general maritime law, sometimes called the law of the sea." *Panama R. Co. v. Johnson*, 264 U.S. 375, 386 (1924). It "incorporates FELA's remedial scheme" by reference. *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 198 (1991). FELA is "major labor and social transportation legislation." *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538, 541 (1968). *A fortiori*, so is the Jones Act.

Dutra errs on multiple levels in asserting that the 1927 LHWCA could not have incorporated the section 3 definition of vessel because it "includes its own, *different* definition of the term." Resp. Br. 8 (emphasis in original); *cf. id.* at 32. LHWCA § 2(21), to which Dutra refers, does not define "vessel" but rather expands that term to include operators and the like.[6] Far more important, *this provision was not part of the 1927 Act*; it was added in 1972, when Congress extensively revised LHWCA and broadened its

Court has consistently applied it in other contexts. *See, e.g., Norton*, 321 U.S. at 571 & n.4; *Ellis v. United States*, 206 U.S. 246, 259 (1907).

[5] *See* Pet. Br. 14-18 (explaining that the "context" restriction was aimed at non-maritime uses of the term vessel, thus showing that Congress intended the section 3 definition to apply to all maritime statutes that do not include their own *vessel* definition).

[6] LHWCA § 2(21) "defines" vessel to mean "any vessel [on which a covered injury occurs] and said vessel's owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer, or crew member."

landward reach. The 1927 Act makes "master or member of a crew of any vessel" the line of demarcation between LHWCA and Jones Act coverage without providing any definition of the term *vessel*. It is evident that Congress used the term in the usual sense, reflecting the settled acceptance of the section 3 definition.[7]

C. Dutra distorts several of this Court's pivotal decisions

Dutra's claim that *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), approved the *DiGiovanni* approach to vessel status, Resp. Br. 25-26, is a serious distortion. *Chandris* vigorously condemned making seaman status turn on "the situation as it exists at the instant of injury," 515 U.S. at 363 (quoting *Easley v. Southern Shipbuilding Corp.*, 904 F.2d 1, 4 (CA5 1992), *cert. denied*, 506 U.S. 1050 (1993)), whereas the *DiGiovanni* court (writing before *Chandris* was decided) forthrightly identified its approach as "a varying status designation depending on the activity at the moment." 959 F.2d at 1123. *Chandris* found such approaches inappropriate because workers should not "oscillate back and forth between Jones Act coverage and other remedies." 515 U.S. at 363. As applied here, the *DiGiovanni* approach has Stewart and his fellow crew members oscillating in and out of Jones Act coverage every two hours. *See* Pet. App. 17. Plainly, *Chandris* prohibits any such test. Later in the opinion, *Chandris* quotes *DiGiovanni* for the proposition that "a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside." 515

[7] Congress has amended LHWCA on a number of occasions since the *Norton* Court construed the "master or member of a crew of any vessel" provision to incorporate the section 3 definition of *vessel*. 321 U.S. at 571 & n.4. Major amendments in 1972 and 1984 specifically addressed the scope of LHWCA coverage, reenacting the crewmember exclusion in each case without change. Pub. L. No. 92-576, § 2(a), 86 Stat. 1651 (Oct. 27, 1972) (amending LHWCA § 2(3)); Pub. L. No. 98-426, § 2(a), 98 Stat. 1653 (Sept. 28, 1984) (amending LHWCA § 2(3)). Under well-settled principles, these subsequent enactments constitute legislative adoption of this Court's prior construction of the statute. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 212 (1993).

U.S. at 373 (quoting *DiGiovanni*, 959 F.2d at 1121). This tangential use of *DiGiovanni* does not constitute an approval of its entire approach.[8]

Dutra is wrong to claim that *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926), "*rejected* section 3's broad definition" of a vessel. Resp. Br. 8 (emphasis in original); *see also id.* at 32-34. The *Evansville* Court in fact quoted section 3 as the operative definition – whereby "'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water" – and then concluded that the wharfboat at issue was not a vessel under section 3 because "[i]t was not practically capable of being used as a means of transportation." 271 U.S. at 20, 22. *Evansville* does not reject section 3; it instead construes and applies the section 3 language.

Dutra cannot challenge the fact that *Ellis v. United States*, 206 U.S. 246 (1907), applying section 3, explicitly held that dredges working in Boston Harbor (like the *Super Scoop*) were "vessels" and that the workers aboard them were "seamen as that name commonly is used." *Id.* at 259; *see* Pet. Br. 15, 27. Dutra instead seeks to rely on its mischaracterization of the dissent. Contrary to Dutra's assertion, Resp. Br. 10 n.2, 22, even the *Ellis* dissent accepted the vessel status of the dredges. *See* 206 U.S. at 265-66 (Moody, J., dissenting). The dissent argued that the dredge workers were not seamen despite the dredges' vessel status because "[t]hey had nothing whatever to do with navigation." *Id.*

Throughout its brief, Dutra distorts the thrust of this Court's seaman-status decisions by subtly misusing certain

[8] Dutra similarly misrepresents the thrust of many of the lower court cases cited in this connection. Four of the cited lower court cases – *Hatch*, *Gipson*, *Spears*, and *Gault* – do indeed "adopt[] the First Circuit's approach." Resp. Br. 26; *cf.* Pet. 8. The other six do not. Dutra seems to think that any court that mentions *DiGiovanni* in any context without express disapproval has adopted its vessel definition approach.

maritime terms of art. For example, Dutra quotes *Warner v. Goltra*, 293 U.S. 155, 157 (1934), for the proposition that a seaman is one who "lives his life on the sea," Resp. Br. 12, without mentioning that the Court was using the phrase to refer to the master of an Ohio River tugboat.[9] On the same page, Dutra quotes *Norton v. Warner Co.*'s reference to "the operation and welfare of the ship when she is upon a voyage," 321 U.S. at 572, without noting that the "ship" in question was a nondescript harbor barge whose "voyages" were confined to the waters of Philadelphia's harbor. More seriously, Dutra suggests that none of the work done by the aspiring seaman in *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997), was deemed by this Court to have been "of a 'seagoing nature.'" Resp. Br. 15. In truth, the *Papai* Court was careful to explain that the work Papai did on vessels moving short distances within the harbor *was* to be regarded as having a "seagoing nature," as involving "seagoing duties" and "seagoing activity," and as "subjecting [Papai] to the perils of the sea." *Id.* at 558-59. Papai's claim for seaman status failed not because his work on moving harbor vessels was not "seagoing" – it was – but because he could not prove that he did a sufficient amount of such work for a single vessel or an identifiable fleet.

D. The 1 U.S.C. § 3 definition is not overly inclusive in the Jones Act context

Dutra's attempt to show that 1 U.S.C. § 3 is "undesirably broad," Resp. Br. 36-37, overlooks the *Evansville* gloss on the statute as well as four of the five established requirements for Jones Act seaman status. *See* Pet. Br. 21-25. The *Evansville* wharfboat and the *Cope* drydock were not section 3 vessels because they were neither used for transportation nor practically capable of such use. For the same reason, neither a floating bridge nor a floating casino that has been permanently attached to the shore would be a section 3 vessel. The shipyard repair worker in *Desper v.*

[9] *See also McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 348-49 (1991) (referring to the Ohio River tugboat master in *Norton* as a "sea-based employee[]").

Starved Rock Ferry Co., 342 U.S. 187 (1952), was not a Jones Act seaman because the boats with which he was engaged had been taken out of navigation. And even if one of these structures could qualify as a vessel, workers claiming Jones Act seaman status must still satisfy the other *Chandris* requirements, including the requirement of a vessel connection that is substantial in both duration and nature.

II. Under 1 U.S.C. § 3, the *Super Scoop* is a vessel

There can be little doubt that the *Super Scoop* satisfies the 1 U.S.C. § 3 vessel definition. *See* Pet. Br. 25-32. It is in fact "used . . . as a means of transportation on water." It regularly transports its workers and equipment over navigable water as it performs its dredging function. Dutra does not dispute that the *Super Scoop* would have been worthless to Dutra if it had been unable to perform its transportation function. *See* Pet. Br. 25; U.S. Br. 21-22.

In its Statement, Dutra stresses how the *Super Scoop* differs from a traditional ocean-going vessel,[10] but this is irrelevant. This Court has clearly held, for example, that vessel status does not require "motive power of its own." *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944); *cf.* Resp. Br. 5 ("[*Super Scoop*] has no propulsion engine or propeller"). The issue before this Court is when "special purpose watercraft," Pet. i, qualify as vessels. Similarly, Dutra questions whether Stewart faced "the perils of the sea," but that challenge also misses the point.[11]

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[10] Dutra has been highly selective. For example, its discussion of the Coast Guard inspection certificates, Resp. Br. 5, omits a key datum showing that *Super Scoop* workers faced the perils of the sea: "While vessel is manned, a rescue vessel . . . shall be standing by." J.A. 91, 96, 99.

[11] Dutra's discussion of the recitation of seamen's hazards in David W. Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79 (1985), *see* Resp. Br. 25, omits the following key passage:

> The sea is obviously a high risk workplace. So is a vessel in motion on navigable water, even though it may be within sight and hailing distance of land. Vessels in active operation are complex industrial enterprises presenting a range of hazards that differ significantly from those incident to work on land,

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Dutra's principal contention on this issue – made here for the first time – is that the *Super Scoop* was "out of navigation" because it "was out of service due to a mechanical problem with one of the scows." Resp. Br. 24. But the fact that the *Super Scoop* was temporarily not digging (for a total of two days) while awaiting on-site repairs to a scow does not begin to meet the out-of-navigation standard established by *West v. United States*, 361 U.S. 118 (1959), and *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952). In *West*, the out-of-navigation vessel had been in the Government's moth-ball fleet "in total deactivation for several years." 361 U.S. at 119. In *Desper*, the out-of-navigation boats were laid up for the winter – "beached and put up on blocks." 342 U.S. at 188. More recently, *Chandris* held that six months in drydock did not necessarily take a ship "out of navigation," noting that "six months . . . seems to be a relatively short period of time for important repairs on oceangoing vessels." 515 U.S. at 374.

III. Amicus Signal's argument that seaman status should be restricted to workers who sleep aboard the vessel is badly misguided and contrary to all relevant statutory, judicial, and secondary authority

Signal begins by presenting a highly misleading picture of the situation facing employers when some

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> piers, drydocks, and even vessels that are temporarily out of active marine operation while securely moored or anchored in protected inland water. A worker whose duties frequently take him aboard moving vessels, or who is otherwise significantly exposed to risks generated by moving vessels, confronts seamen's dangers. Like the perils of the sea, the risks attending the movement of vessels on navigable water are also distinguishing characteristics of the seaman's work environment.

64 Tex. L. Rev. at 80-81. Stewart's injury occurred when the floating scow on which he was working moved across the water's surface and collided with the floating *Super Scoop*. This key fact makes nonsense of Dutra's statement that "[t]he proximity of the harbor was coincidental" to Stewart's injury. Resp. Br. 24.

employees are near the border between Jones Act seamen and LHWCA coverage.[12] It then puts forward a radical new proposal to limit seamen's benefits to workers whose service to vessels includes sleeping on board. Signal's sole supporting authority is a one-judge dissent in a 1956 Second Circuit decision. The Second Circuit's decision and a plethora of other authority directly and powerfully rebut Signal's argument.

A. In any event, Signal's argument is not properly before this Court

Not only is Signal wrong as a matter of substance, its argument is not even properly before this Court. Most importantly, the argument is irrelevant to the question presented. Whether an employee sleeps aboard the vessel or commutes from a land-based home is recognized as one factor that the jury may consider to determine whether an injured worker satisfies the *Chandris* connection requirements, but it has nothing to do with the vessel status issue. *See, e.g., Bertrand v. Int'l Mooring & Marine, Inc.*, 700 F.2d 240, 247 & n.15 (CA5 1983). Indeed, the sole authority supporting Signal's argument (*see infra* part III-B) treats the issue of where the worker sleeps as relevant only "[i]n determining whether a worker has such a permanent connection with a ship as makes him a 'seaman.'"

[12] It is not true, as Signal asserts, that employers must immediately pay whatever benefits an injured worker seeks. *See* Signal Br. 1-2. LHWCA § 14(a) expressly recognizes an employer's right to controvert LHWCA responsibility. An employer may also resist responsibility for seamen's benefits (as Dutra did here). Nor is it true, as Signal implies, that employers face double liability. *See* Signal Br. 2. LHWCA § 3(e) credits Jones Act damages against the employer's LHWCA exposure, and case law provides for "full compensation credit" when an employer first pays LHWCA benefits and is then held responsible for seamen's benefits. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 92 n.5 (1991). *See also Figueroa v. Campbell Industries*, 45 F.3d 311, 315 (CA9 1995) ("double recovery of any damage element is precluded"); Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 435 (2d ed. 1975) ("compensation payments will be routinely deducted from the damage recovery if the Jones Act action is successful").

Weiss v. Central R.R. Co., 235 F.2d 309, 315 (CA2 1956) (Lumbard, J., dissenting). Thus, in Signal's only authority vessel status was admitted. *See, e.g., id.* ("Here of course there was no question that the ship was in navigation.").

Vessel status is now the sole issue in this case. *See* Pet. App. 21 (noting that Dutra has conceded the remaining requirements for seaman status); Pet. i (question presented is "the legal standard for determining whether a special purpose watercraft (such as a dredge) is a Jones Act 'vessel' "). Whether Stewart had a sufficient connection to the *Super Scoop* is not before the Court.

Even if Signal's novel argument were relevant to the question presented, it has not been advanced by either party and was neither raised nor passed on below. This Court should thus decline to address it. *See, e.g., Reno v. Koray*, 515 U.S. 50, 55-56 n.2 (1995) (such an amicus "argument is not properly before the Court"); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) ("declin[ing] to address" an amicus argument that "was neither raised below nor squarely considered by the Court of Appeals; nor was it advanced by respondents").

B. In pre-Jones Act cases, courts routinely provided seamen's remedies to seamen who slept ashore

Signal argues that the Jones Act should be limited to seamen who sleep on the vessel on the asserted theory that they were the only workers entitled to recover "maintenance and cure," one of the traditional seamen's remedies, at the time Congress passed the Act. Signal cites no case supporting its claim that pre-Jones Act seamen who did not sleep aboard vessels were ineligible for maintenance and cure.[13] Signal's sole authority for the argument

[13] Signal cites *Reed v. Canfield*, 20 F. Cas. 426 (No. 11,641) (C.C.D. Mass. 1832), for the proposition that "[a] voyage away from home was the basis for a maintenance and cure award." Signal Br. 8. But in *Reed*'s most relevant passage, Justice Story rejected the argument "that the maritime law applies only to . . . injuries occurring in the ship's service

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that such a limitation *should* be imposed is Judge Lumbard's 1956 dissent in *Weiss*. *See* Signal Br. 15. In that very case, however, the Second Circuit held that a ferryboat deckhand could recover maintenance and cure despite the fact that "he . . . slept ashore," 235 F.2d at 311. The court explained that it "kn[e]w of no authority . . . for holding that a seaman is not entitled to the traditional privileges of his status merely . . . because he sleeps ashore." *Id.* at 313; *see also The Bouker No. 2*, 241 F. 831 (CA2 1917) (permitting maintenance and cure for a harbor tug engineer who slept at home a great deal of the time).

Moreover, even if the maintenance and cure remedies had been limited to seamen who slept on the vessel, this would be irrelevant because the controlling test is whether a worker would have been considered a seaman "under the general maritime law when Congress passed the Jones Act." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). As the *Wilander* Court explained, Congress intended Jones Act seamen to be not only those workers who were entitled to maintenance and cure (and other traditional tort remedies) under the general maritime law, but also those workers who were entitled to a maritime lien against the vessel for unpaid wages. *Id.* at 343.

The pre-Jones Act case law established that seamen were entitled to wage liens whether or not they slept aboard the vessel. In *The Minna*, 11 F. 759, 760 (E.D. Mich. 1882), for example, then-Judge Henry Billings Brown, who was later to author this Court's opinion in *The Osceola*, 189 U.S. 158 (1903), upheld a wage lien on behalf of a seaman who served on a vessel during the day and lodged ashore at night. In *The May Queen*, 16 F. Cas. 1268 (No. 9,360) (D. Mass. 1861), the court explained a wage lien for sleep-ashore seamen as follows:

> [L]iving on shore is by no means a decisive criterion. . . . Indeed, such is the rapidity with which passages are now made, that a steamer may run

during the voyage abroad," *id.* at 427, and thus affirmed a maintenance and cure award for a seaman injured in the vessel's home port.

> by daylight, on the high seas, from state to state, and yet the officers may sleep and take their meals on shore.

Id. at 1269.[14] *See also The Virginia Belle*, 204 F. 692, 694 (E.D. Va. 1913) (upholding a sleep-ashore seaman's wage lien).[15]

In any event, it was well-established before Congress passed the Jones Act that workers on dredges were seamen under maritime law. Indeed, Dutra has not disputed that in *Ellis*, 206 U.S. at 259, the Court specifically found that workers on dredges performing work in Boston Harbor were "seamen as that name commonly is used," and that the pre-Jones Act decisions of the lower courts had uniformly treated dredges as vessels whose workers were entitled to seaman

[14] This passage from *The May Queen* highlights the way in which a changing technology – the advent of steam – enabled seamen to perform their duties at sea while sleeping on land. As the Diamond Offshore amicus brief illustrates, this process accelerated during the late twentieth century. Denying these workers their seamen's benefits would be inconsistent with *Wilander*'s theme that maritime law must continually evolve to keep pace with the "'new kinds of property [vessels] as they spring into existence in the progress of society'" and in recognition of "the myriad purposes for which ships set to sea." 498 U.S. at 344 (quoting Erastus C. Benedict, *The American Admiralty* § 241, at 133 (1850)); *see also Saylor v. Taylor*, 77 F. 476, 478-79 (CA4 1896) ("far-reaching [admiralty] principles . . . adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world").

[15] In many other cases arising prior to the Jones Act, the opinions do not specifically say where the seamen slept (which the courts would have considered irrelevant), but it can be inferred from the nature of the work that the seamen probably slept ashore. *See, e.g., George Leary Const. Co. v. Matson*, 272 F. 461 (CA4 1921); *Southern Log Cart & Supply Co. v. Lawrence*, 86 F. 907 (CA5 1898); *Saylor v. Taylor*, 77 F. 476 (CA4 1896); *McRae v. Bowers Dredging Co.*, 86 F. 344 (C.C.D. Wash. 1898); *The Herdis*, 22 F.2d 304 (D. Md. 1927); *The Hurricane*, 2 F.2d 70 (E.D. Pa. 1924), *aff'd*, 9 F.2d 396 (CA3 1925); *Steam Dredge No. 1*, 87 F. 760 (D.N.J. 1898); *Lawrence v. Flatboat*, 84 F. 200 (S.D. Ala. 1897); *The Starbuck*, 61 F. 502 (E.D. Pa. 1894); *The Atlantic*, 53 F. 607 (D.S.C. 1893); *The Hattie Thomas*, 59 F. 297 (D. Conn. 1894); *The Maggie P.*, 32 F. 300 (E.D. Mo. 1887).

benefits. *E.g.*, *Saylor v. Taylor*, 77 F. 476 (CA4 1896); *McRae v. Bowers Dredging Co.*, 86 F. 344 (C.C.D. Wash. 1898); *The Atlantic*, 53 F. 607 (D.S.C. 1893).

C. Signal distorts the pre-Jones Act jurisprudence by misusing the maritime term of art *voyage*

Signal also tries to support its novel theory with the erroneous assertion that a seaman's maritime-law entitlement to wages "to the end of the voyage" somehow requires Jones Act seamen to "embark[] on voyages away from home." Signal Br. 10. But this conclusion misuses the term "voyage" as used to limit an employer's obligation to pay an injured seaman unearned wages (i.e., the wages that the seaman would have earned if he had continued working instead of being injured).

The duration rule for the wages obligation is often expressed in terms of "the end of the voyage," but this means (and has always meant) the conclusion of the contractual period of employment. Professor Schoenbaum, counsel for Signal, clearly articulates this rule in his academic writings:

> A seaman who is injured or becomes sick during his service is granted the wages he would have earned had he been able to complete the contractual terms of his employment. Such unearned wages are due until the end of his period or until he becomes fit for duty, whichever is first. Traditionally this means that the seaman is paid until the end of the voyage. . . . *If the seaman is employed for a definite contract term instead of on a voyage basis, he may recover wages for the entire period that is the basis of his employment.*

1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 6-29, at 381-82 (4th ed. 2004) (footnotes omitted) (emphasis added).[16] Plainly the right to unearned wages was no more

[16] An earlier passage in this treatise accepts the vessel status standard based, as Stewart argues here, on the statutory definition

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tied to any traditional idea of a voyage away from home than was the right to maintenance and cure.[17] Thus in *The J.F. Card*, 43 F. 92, 93 (E.D. Mich. 1890), then-Judge Henry Billings Brown awarded unearned wages beyond the end of a Great Lakes trip on the view that the seaman was contractually bound to the ship for a month. *See also, e.g.*, *Farrell v. United States*, 336 U.S. 511, 519-21 (1949).

D. Confining seaman status to those who sleep aboard would be at odds with all modern jurisprudence

In the 84 years since the enactment of the Jones Act, the courts have continued to recognize the complete availability of the seamen's personal injury actions – including damages under the Jones Act and maintenance, cure, and unearned wages – to workers who sleep ashore.[18]

(with no reference to a vessel-as-home test). *See* Schoenbaum, § 6-9, at 299 & n.86 (citing 1 U.S.C. § 3).

[17] The duration rule for the maintenance and cure obligation is based on when the injured seaman reaches "maximum cure." *See, e.g.*, *Farrell v. United States*, 336 U.S. 511, 518 (1949); *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 530 (1938). This duration rule was recognized long before Congress enacted the Jones Act. *See, e.g.*, *Great Lakes S.S. Co. v. Geiger*, 261 F. 275, 277 (CA6 1919); *Reed v. Canfield*, 20 F. Cas. 426, 429 (No. 11,641) (C.C.D. Mass. 1832) (Story, J.); *The City of Alexandria*, 17 F. 390, 393 (S.D.N.Y. 1883) (Addison Brown, J.).

[18] *See, e.g.*, *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957); *Lorimer v. Great Lakes Dredge & Dock Co.*, 36 Fed. Appx. 294 (CA9 2002); *Deisler v. McCormack Aggregates*, 54 F.3d 1074 (CA3 1995); *Barnes v. Andover Co.*, 900 F.2d 630, 641 (CA3 1990); *Williamson v. Western Pac. Dredging Corp.*, 441 F.2d 65 (CA9 1971); *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523 (CA5 1960); *Weiss v. Central R.R. Co.*, 235 F.2d 309 (CA2 1956); *McKie v. Diamond Marine Co.*, 204 F.2d 132 (CA5 1953); *Bailey v. City of New York*, 153 F.2d 427 (CA2 1946); *Pariser v. City of New York*, 146 F.2d 431 (CA2 1945); *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991 (CA1 1941); *Maryland Cas. Co. v. Lawson*, 94 F.2d 190 (CA5 1938); *Butler v. Ellis*, 45 F.2d 951 (CA4 1930); *Buffalo & Grand Island Ferry Co. v. Williams*, 25 F.2d 612 (CA2 1928); *The Falco*, 20 F.2d 362 (CA2 1927); *Brinegar v. San Ore Constr. Co.*, 302 F. Supp. 630 (E.D. Ark. 1969); *Duplantis v. Williams-McWilliams Industries, Inc.*, 298 F. Supp. 13 (E.D. La. 1969); *Richardson v. St. Charles-St. John the Baptist Bridge & Ferry Auth.*, 284

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Judge Rubin provided a good explanation for the soundness of this rule in *Hudspeth v. Atlantic & Gulf Stevedores, Inc.*, 266 F. Supp. 937, 943 (E.D. La. 1967):

> To deny one who is clearly a seaman the right to maintenance merely because he does not receive lodging and meals aboard ship raises problems that would distort the simple lines of the maintenance remedy. The logical extension of such a rule would be to hold that, if such a seaman is hospitalized, he must provide his own meals; his employer need provide only the cure. If a seaman were at sea five days a week, but was normally ashore and provided his own lodging and food for two days a week, the same reasoning would indicate that he should be paid maintenance only for 5/7 of the period during which he is disabled.

Such elaborations – which the Signal rule would require – are antithetical to this Court's oft-repeated admonition that maintenance and cure must remain simple and as nonlitigious as possible.[19] As Judge Bailey Aldrich observed, defendants that try to confine the seamen's remedies to "'blue water' seamen [are] trying to reverse history." *Macedo v. F/V Paul & Michelle*, 868 F.2d 519, 521 (CA1 1989).[20]

E. Signal distorts the 1927 LHWCA

The question at the heart of this case is the meaning of the term *vessel* in the 1927 LHWCA provision – "a

F. Supp. 709 (E.D. La. 1968); *Hudspeth v. Atlantic & Gulf Stevedores, Inc.*, 266 F. Supp. 937 (E.D. La. 1967); *Ledet v. U.S. Oil, Inc.*, 237 F. Supp. 183 (E.D. La. 1964); *Creppel v. J.W. Banta Towing, Inc.*, 202 F. Supp. 508 (E.D. La. 1962); *Early v. American Dredging Co.*, 101 F. Supp. 393 (E.D. Pa. 1951). *See also* 1B *Benedict on Admiralty* § 51 at 4-79 to 80 (7th rev. ed. 2002) (collecting cases).

[19] *See, e.g., Vella v. Ford Motor Co.*, 421 U.S. 1, 4 (1975); *Warren v. United States*, 340 U.S. 523, 530 (1951); *Farrell*, 336 U.S. at 516; *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 735-36 (1943).

[20] Even if Signal were correct that maintenance and cure should now be confined to seamen who sleep on ships, this would have little bearing on Jones Act seaman status and none whatsoever on the meaning of the term "vessel." *Cf. supra* at 10-11, 12.

master or member of a crew of any vessel" – drawing the line between LHWCA and Jones Act coverage. Congressional activity leading to the enactment of the 1927 LHWCA, *see* Pet. Br. 28-30, comprised four relevant steps. First, the Senate sent the House of Representatives a bill (S. 3170, 69th Cong., 1st Sess. (1926)) that excluded all seamen from LHWCA coverage,[21] leaving the seamen to their Jones Act and general maritime remedies. Second, the House Judiciary Committee disagreed with the exclusion of seamen from LHWCA coverage and sought to bring them all under the LHWCA by including them in its bill's "coverage" provision, section 3(b):

> This act shall apply to any maritime employment performed . . . as master or member of a crew of a barge, lighter, tug, dredge, vessel, or other ocean, lake, river, canal, harbor, or floating craft owned by a citizen of the United States.

H.R. Rep. No. 1767, 69th Cong., 2d Sess. at 2 (1927).[22] Third, the House Judiciary Committee included the following provision in section 5 of its bill:

> If the injured employee be *a master or member of a crew as provided in section 3(b) of this act*, he shall have and retain, in addition to compensation under this act, maintenance and cure and wages to the end of the voyage as now provided in maritime law . . . .

[21] The Senate bill excluded from LHWCA coverage "a master or seaman as defined in section 4612 of the Revised Statutes." Union Calendar No. 644, 69th Cong., 2d Sess. 2 (1927). Revised Statutes § 4612 defined "master" to include "every person having command of any vessel belonging to any citizen of the United States," "seaman" to include "every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board [any vessel belonging to any citizen of the United States]," and "vessel" to "comprehend every description of vessel navigating on any sea or channel, lake, or river."

[22] The House Judiciary Committee's bill also used the quoted language to define "employee" in section 2(3) and in defining "employer" in section 2(4). *See* H.R. Rep. No. 1767 at 1.

H.R. Rep. No. 1767 at 3 (emphasis supplied). Fourth, the House Judiciary Committee was eventually persuaded to acquiesce in the Senate position. Accordingly it amended its bill to restore the Senate language. *See* 68 Cong. Rec. 5402 (Mar. 2, 1927). Then – having "understood upon examination that [the Senate language] created confusion and would interfere with and mar the harmony of the bill," *id.* at 5403, the Judiciary Committee substituted the following exclusion provision that was subsequently enacted into law:

> The term "employee" does not include a master or member of a crew of any vessel . . . .

1927 LHWCA § 2(3), 44 Stat. 1425.[23]

Signal's treatment of the 1927 LHWCA, Signal Br. 11-14, acknowledges the first two steps in the foregoing account but veers away at step three by claiming that section 5 of the House Judiciary Committee bill preserved the seamen's remedies of maintenance, cure, and wages for only a "narrow class" of seamen, those "seafarers who embarked on voyages away from home" – *viz.*, workers on traditional ocean-going ships – and not for "the crew[s] of the barges, lighters, tugs, dredges, or other ocean, lake, river, canal, harbor, or floating craft who were also to be included in the LHWCA." Signal Br. 12-13 & n.20. This claim is wrong; it is flatly contradicted by the above-italicized language of section 5, which preserved the seamen's remedies for all of the masters and crew members covered by "section 3(b) of this act."[24] Then – without any intelligible argument in support of the supposed connection[25] – Signal simply

[23] The same language was used in 1927 LHWCA § 3(a)(1), 44 Stat. 1426.

[24] Signal accomplishes its distortion by omitting to quote section 5 and instead manipulating the House Report's language summarizing the bill. *See* Signal Br. at 12 (paraphrasing and quoting H.R. Rep. No. 1767 at 20 rather than *id.* at 3, where the text of section 5 actually appears).

[25] The selection from Andrew Furuseth's testimony, Signal Br. 13 n.21, shows only that witness's preoccupation with traditional ocean-going sailors. Other witnesses directed congressional attention to the fact that many of the "large number of employees engaged on harbor craft, on tugs, on lighters, and all of the diversified employees who are engaged in

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asserts that when the House Committee ultimately decided to take seamen out of its bill, it meant to take out only the "narrow class" to which (on Signal's mistaken view) the section 5 provision had been confined.

Signal's reading of the 1927 Act is wrong for at least five reasons: **(1)** Most fundamentally, Signal ignores what the Act says: It excludes "a master or member of a crew of *any* vessel." 1927 LHWCA § 2(3) (emphasis supplied). Confining the term "any vessel" to "a traditional ocean-going ship" is a tortured construction. **(2)** Signal's reading rests entirely upon the false premise that section 5 of the House Committee bill preserved the seamen's remedies only for workers on traditional ocean-going ships. Quite to the contrary, this proposed section confirms Congress's understanding that dredge workers were entitled to the traditional seamen's remedies of "maintenance and cure and wages to the end of the voyage." **(3)** Signal ignores the explanations of the 1927 Act on the House and Senate floors as it was being enacted.[26] **(4)** Crediting Signal's claim would mark a huge break from prior Jones Act jurisprudence as it would exclude from seaman status not only dredge workers but also workers on barges, lighters, tugs, and other ocean, lake, river, canal, harbor, or floating craft – a broad class of workers whose entitlement to seaman status has repeatedly been affirmed by this Court. *E.g.*, *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957) (dredge); *Norton v. Warner Co.*, 321 U.S. 565 (1944) (barge); *Butler v. Whiteman*, 356 U.S. 271 (1958) (tug); *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) (per curiam) (other floating craft). **(5)** Congress reenacted the "master or member of a crew of any vessel" provision in 1972 and

transportation in the harbors" are also seamen. Hearings on S. 3170 before the House Judiciary Comm., 69th Cong., 1st Sess. 141-42 (1926).

[26] *See* 68 Cong. Rec. 5402-03, 5410-12 (Mar. 2, 1927), where the Chair of the House Judiciary Committee (Rep. Graham) as well as several of his colleagues repeatedly proclaimed that the language excluding "a master or member of a crew of any vessel" was entirely clear in removing all seamen from LHWCA coverage. For identical claims by Senate supporters of the Act, *see* 68 Cong. Rec. 5908 (Mar. 4, 1927).

again in 1984, well knowing that this Court's 1944 decision in *Norton* had interpreted the provision to incorporate the 1 U.S.C. § 3 definition of *vessel*. *See supra* note 7.

IV. The First Circuit's test for Jones Act vessel status is fundamentally flawed

The First Circuit's *DiGiovanni-Stewart* rule conflicts with *Chandris*. *See supra* at 5; Pet. Br. 33-34. It also conflicts with *Wilander*'s emphasis on the courts' "obligation not to narrow unduly the class for whom Congress provided recovery under the Jones Act." 498 U.S. at 351. Even Dutra's supporting amici are unwilling to defend it. LaQuay does not discuss the First Circuit rule, and Signal correctly attacks it as "hav[ing] no grounding in legislative history" and as "impractical to administer," Signal Br. 19. This Court should now reject *DiGiovanni* and follow Congress's definition of the statutory term "vessel."

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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No. 03-814

In The
Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE SURREPLY BRIEF AND SURREPLY BRIEF OF RESPONDENT DUTRA CONSTRUCTION CO.

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MOTION OF RESPONDENT DUTRA CONSTRUCTION CO. FOR LEAVE TO FILE SURREPLY BRIEF

The Respondent Dutra Construction Co. hereby requests leave to file the accompanying surreply brief. In support of this Motion, Dutra states as follows:

1. In his reply brief, relying in part on an inadvertently mistaken statement in Dutra's original brief, the Petitioner suggests that an argument in Dutra's brief is invalid.

2. In fact, as the accompanying surreply explains, the Petitioner's point not only does not diminish Dutra's argument, the argument applies with even *more* force.

3. The accompanying surreply is very brief and will assist the Court. Its filing will not prejudice the Petitioner.

4. In the circumstances, a brief surreply is in order so that Dutra can respond to the Petitioner's charge and set the record straight.

For the foregoing reasons, Dutra respectfully requests leave to file the accompanying surreply brief.

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INTRODUCTION

The Petitioner's Reply brief does not directly respond to the substance of the Respondent Dutra Construction Company's brief, but does attempt to question a few peripheral aspects of Dutra's arguments. One such peripheral matter is Dutra's inadvertent error in saying that a definition added to the Longshore and Harbor Workers Compensation Act ("LHWCA") in 1972 was part of the LHWCA when it was enacted in 1927. The Petitioner wrongly suggests that this invalidates Dutra's substantive point. In fact, the Petitioner's reply on this issue misses the larger truth of Congress's intent as to the meaning of the term "vessel."

ARGUMENT

In its principal brief, Dutra asserted that the LHWCA, when enacted in 1927, included a definition of the term "vessel" that was unlike the definition appearing in 1 U.S.C. § 3, and that this conflict of definitions indicated that Congress did not wish to follow or endorse section 3's definition when it enacted the LHWCA. (Dutra br. 32) In reply to this point, the Petitioner says two things: First, the LHWCA's definition of the term "vessel" is not, in fact, a definition at all. Second, the definition did not appear in the LHWCA when enacted in 1927, but was added by amendment in 1972, and this somehow undercuts Dutra's basic argument. (Pet. reply br. 4) As to both points the Petitioner is mistaken.

I. THE LHWCA *DOES* DEFINE THE TERM "VESSEL."

The LHWCA includes a section specifically defining twenty-two different terms used in the Act. *See* 33 U.S.C. § 902 ("Definitions"). In pertinent part, section 902 provides:

> When used in this chapter –
>
> * * *
>
> (21) Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death. . . .

33 U.S.C. § 902(21). Manifestly, this *is* a definition of "vessel." It is the definition that Congress chose. It may not be a model of clarity and detail, and it may not serve the Petitioner's interests in this case, but it is a definition nonetheless, and courts routinely rely on and refer to it as such. *E.g.*, *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 530 (1983); *Gravatt v. City of New York*, 226 F.3d 108, 115 (2d Cir. 2000); *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 606 (1st Cir. 1996); *Torres v. Johnson Lines*, 932 F. 2d 748, 749 (9th Cir. 1991); *Trussell v. Litton Sys., Inc.*, 753 F. 2d 366, 367 & notes 3-4 (5th Cir. 1984); *Brown v. Peter Hahn GMBH*, 89 F. Supp. 2d 735, 741 (E.D. Va. 2000); *Dougherty v. Navigazione San Paolo*, 622 F. Supp. 1, 2 (E.D. Pa. 1984).

II. THE LHWCA's 1972 DEFINITION OF "VESSEL" IS FURTHER EVIDENCE THAT CONGRESS DID NOT INTEND TO INCORPORATE 1 U.S.C. § 3's DEFINITION.

The Petitioner correctly notes that, contrary to a statement in Dutra's brief, the definition of "vessel" at 33 U.S.C. § 902(21) was not part of the LHWCA when it was enacted in 1927, but was added to the statute by amendment in 1972. This small point misses the forest for the trees. Notwithstanding that the LHWCA's "vessel" definition first appeared in 1972, Dutra's essential point as to Congressional intent is undiminished: Congress's treatment of the "vessel" concept in relation to the LHWCA is indicative of an implicit decision *not* to incorporate section 3's definition of "vessel." Moreover, the 1972 definition of "vessel" is additional evidence in support of this view.

The Petitioner does not dispute that Congress is accustomed to incorporating 1 U.S.C. § 3's definition and other definitions into legislation where it considers that appropriate and desirable. (*See* Dutra br. 29-30) The "vessel" definition appearing at 1 U.S.C. § 3 is the successor to prior enactments that predated the LHWCA's 1927 promulgation by decades, and presumably were known to Congress. (Pet. br. 16) As such, in 1927, at a time when the "vessel" concept was *far* from established,[1] Congress in

---

[1] As the very existence of this case bears witness, for Jones Act purposes, the vessel concept generally and the 1 U.S.C. § 3 definition are not clearly established *now*, and certainly were not in 1927. *See, e.g.*, *Evansville and Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 22 (1926) (defining vessel differently than section 3); *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 627-630 (1887) (same); David W. Robertson, Steven F. Freidell, and Michael F. Sturley, *Admiralty and Maritime Law in the United States*, 59 (Carolina Acad. Press 2001) (section

(Continued on following page)

enacting the LHWCA let pass the opportunity to restate or incorporate the extant definition of "vessel" that ultimately was codified at 1 U.S.C. § 3. In this way, Congress effectively *rejected* the section 3 definition.

Forty-five years later, Congress amended the LHWCA in part to insert a definition of "vessel." *Again*, Congress did not incorporate section 3's definition. The reasonable implication of that action is that – *directly* contrary to the Petitioner's premise that section 3 supplies a controlling definition of "vessel" – Congress did *not* wish to adopt section 3's definition. That Congress would *twice* eschew section 3's definition in this way makes perfect sense in light of its deletion of a similar definition when enacting the Jones Act (Dutra br. 27-29), this Court's effective rejection of section 3's definition (Dutra br. 33-34), the problematic overbreadth of section 3 (Dutra br. 36-38), and the long-standing practice and general desirability of *judicial* development of the "vessel" concept.

Dutra's point that Congress did not intend to follow section 3 when it enacted the LHWCA in 1927 remains valid. Moreover, the fact that Congress by implication *reaffirmed* its 1927 rejection of section 3 in 1972 when it once again ignored section 3 and created a different

3's definition "has not been very influential. . . . When courts mention [it], it usually seems to be a makeweight argument."); Brief of Amicus Association of Trial Lawyers of America at 7 ("[I]rreconcilable conflict and confusion exist among the various courts that have attempted to define ['vessel']."); Brief of Amicus United Brotherhood of Carpenters and Joiners at 12 ("The lower courts have developed a gaggle of conflicting vessel definitions."); Petitioner's Court of Appeals Brief at 19 ("[T]here is no statute specifically defining [vessel] for the Jones Act.").

"vessel" definition only *strengthens* Dutra's point. The Petitioner is wrong to suggest otherwise.

CONCLUSION

The First Circuit's decision should be affirmed.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

To qualify for "seaman" status under the Jones Act, 46 U.S.C. App. 688(a), a worker must have "an employment-related connection to a vessel in navigation." *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 357 (1995). The question presented is what is the legal standard for determining whether a special purpose watercraft (such as a dredge) is a Jones Act "vessel."

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question of the appropriate standard for determining whether a dredge is a "vessel" such that an individual employed on it is a "seaman" entitled to bring a negligence action under the Jones Act. 46 U.S.C. App. 688(a). A Jones Act "seaman" is synonymous with a "master or member of a crew of any vessel" excluded from workers' compensation coverage under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 902(3)(G). *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 345-346 (1991). The Jones Act and the LHWCA are accordingly "mutually exclusive compensation regimes." *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 355-356 (1995).

The Secretary of Labor administers the LHWCA. 33 U.S.C. 939. The Secretary has delegated her responsibilities to the Director of the Office of Workers' Compensation Programs (OWCP), who administers the LHWCA pursuant to

regulations codified at 20 C.F.R. Pts. 701-704. The Director may be a party and participate in any proceedings under the LHWCA. Because of the mutually exclusive nature of coverage under the Jones Act and the LHWCA, resolution of the question presented will define the extent of the LHWCA's coverage in this area and may affect the administration of the Act by the Director of OWCP. For instance, the Director has taken the position in his administration of the LHWCA that an employee on a dredge is a seaman excluded from the LHWCA under 33 U.S.C. 902(3)(G). Br. for the Director, OWCP, *Lorimer* v. *Great Lakes Dredge & Dry Dock Co.*, 36 Fed. Appx. 294 (9th Cir. 2002) (No. 70849) (*available in* 2001 WL 34108609). The United States therefore has a substantial interest in this case.

STATEMENT

This case concerns the applicability of the Jones Act to an individual employed on a dredge working in Boston Harbor. For the reasons set forth below, the United States submits that a watercraft qualifies as a Jones Act vessel (and its crew as "seamen") if the craft is used or practically capable of being used as a means of transportation on water, and that the dredge at issue in this case should be deemed a vessel in navigation for Jones Act purposes.

1. The Jones Act provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury." 46 U.S.C. App. 688(a). The Act thus provides a worker who is a "seaman" with a negligence cause of action against his employer. The LHWCA is a workers' compensation statute that applies to certain employees injured in the course of maritime employment "upon the navigable waters of the United States" and in adjoining areas. 33 U.S.C. 903(a). The LHWCA defines an

"employee" covered by the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include * * * *a master or member of a crew of any vessel.*" 33 U.S.C. 902(3)(G) (emphasis added).

The "master or member of a crew of any vessel" excluded from the LHWCA is synonymous with the "seaman" covered under the Jones Act. In other words, the phrase "'master or member of a crew' restates who a 'seaman' under the Jones Act is supposed to be." *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 348 (1991); accord *Harbor Tug & Barge Co.* v. *Papai*, 520 U.S. 548, 553 (1997) ("[T]he LHWCA and the Jones Act are 'mutually exclusive'" since the "masters and crewmembers [excluded under 33 U.S.C. 902(3)(G)] are the seamen entitled to sue for damages under the Jones Act." (quoting *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 355-356 (1995)). "Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute." *Wilander*, 498 U.S. at 347.

"The key to seaman status is employment-related connection to a vessel in navigation." *Wilander*, 498 U.S. at 355. That requirement has two components: (1) the "employee's duties must 'contribute[] to the function of the vessel or to the accomplishment of its mission'" and (2) the employee "must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Chandris*, 515 U.S. at 368 (citation omitted); *Harbor Tug & Barge*, 520 U.S. at 554. The requirement that a seaman have a connection to a vessel in navigation that is substantial in duration and nature distinguishes sea-based employees, who are covered by the Jones Act, from land-based maritime workers, who

have only a transitory connection to a vessel in navigation and are covered by the LHWCA. *Ibid.*

The question whether a worker has the requisite employment-related connection to a vessel in navigation is a mixed question of law and fact. The court "define[s] the legal standard," and the jury "finds the facts, and * * * applies the legal standard." *Wilander*, 498 U.S. at 356. "If reasonable persons, applying the proper legal standard, could differ as to whether the employee" is a seaman, "it is a question for the jury." *Ibid.* Conversely, "summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Ibid.*

2. Respondent employed petitioner as a marine engineer to maintain the mechanical systems of the *Super Scoop*, "a large floating platform * * * equipped with a clamshell bucket." Pet. App. 16-17. Respondent used the *Super Scoop* to dig a cross-harbor trench in the Boston Harbor for the Ted Williams Tunnel. *Id.* at 17; see *DutraSuper Scoop* (visited May 7, 2004) <http://www.bigdig.com/thtml/equip30.htm> (picture of *Super Scoop* in Boston Harbor); accord Dan McNichol, *The Big Dig* 56-57 (2000). The *Super Scoop* "operates as a dredge, removing silt from the ocean floor and dumping sediment onto one of two scows that float alongside." Pet. App. 17; see 9 *The Encyclopedia Americana* 374 (Int'l ed. 2000) ("Typically, a dredge [has] some sort of scoop to pick up material and a derricklike mechanism to lift the scoop with its load and to dump it."). Once the *Super Scoop* filled her scows, tugboats towed the scows out to sea where they disposed of the dredged material. Pet. App. 17.

The *Super Scoop* had "navigation lights, ballast tanks, and a dining area for the crew." Pet. App. 17. The *Super Scoop*'s chief officer was referred to as "captain," and the employees working on it as "crew." C.A. App. 254-255 (Def's Admis. Resp. Nos. 17, 21). Crew members generally were required to wear life jackets while working on the *Super Scoop* and

were transported to and from it by boat. *Ibid.* (Def's Admis. Resp. Nos. 19, 20). The Coast Guard classified the *Super Scoop* as an industrial vessel, and respondent was required to register her with the Coast Guard and comply with safety regulations issued by the Coast Guard and the United States Department of Transportation. Pet. App. 17.[1] In addition, the American Bureau of Shipping had issued a load-line certificate to the *Super Scoop*. *Ibid.*; C.A. App. 268 (certificate); see Committee on Standardization and Special Research, *A Port Dictionary of Technical Terms* 133 (1940) ("The term load-line means a line or mark to indicate maximum depth to which a vessel may be loaded safely.").

The *Super Scoop* had limited means of self-propulsion. Crew members used anchors and cables to move the *Super Scoop*, and during her operations in the Boston Harbor she typically moved once every two hours, covering a distance of 30 to 50 feet. Pet. App. 17; C.A. App. 252 (Def's Admis. Resp. No. 5) ("[O]n most days during the time that the Superscoop was performing dredging it would be moved a short distance by use of its anchors."). For movement over longer distances, the *Super Scoop* was towed by another vessel, as when she was towed from her home base in California, through the Panama Canal, and up the Eastern seaboard to Boston Harbor. *Ibid.* (Def's Admis. Resp. No. 4).

In 1993, during the course of petitioner's employment on the *Super Scoop*, petitioner boarded one of the adjacent scows to make repairs. Pet. App. 18. The *Super Scoop*'s crew proceeded to move the scow while petitioner was working, causing it to collide with the *Super Scoop*. Jolted

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[1] The Coast Guard's certificate of inspection provided that the *Super Scoop* was required to be unmanned while in oceans but that the "vessel may carry up to 10 industrial personnel when operating on protected waters in Boston Harbor between East Boston and South Boston." C.A. App. 266 (12/12/91 Certificate of Inspection). The certificate also authorized the *Super Scoop* to carry up to 466 short tons of deck cargo. *Ibid.*

by the impact, petitioner fell to a deck below and sustained serious injuries. *Ibid.*

3. Petitioner filed suit in the United States District Court for the District of Massachusetts under the Jones Act, 46 U.S.C. App. 688(a), alleging that he was a seaman injured by respondent's negligence. He also filed an alternative claim (in the event that he was found not to be a seaman) under Section 5(b) of the LHWCA, 33 U.S.C. 905(b), which authorizes employees covered by that Act to sue a "vessel" owner as a third party for an injury caused by the owner's negligence. Pet. App. 3.

Respondent moved for summary judgment on the Jones Act claim, arguing that petitioner was not a seaman. Respondent acknowledged that petitioner was "a member of the [*Super Scoop*'s] crew," Pet. App. 21, and that his "duties contributed to the function" of the *Super Scoop*, C.A. App. 38 (Def's Mem. in Support of Sum. J.), but argued that the *Super Scoop* was not a vessel in navigation. Respondent relied upon the First Circuit's decision in *DiGiovanni* v. *Traylor Brothers*, 959 F.2d 1119 (en banc), cert. denied, 506 U.S. 827 (1992), which held that "if a barge or other float's 'purpose or primary business is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit" at the time of the plaintiff's injury. *Id.* at 1123 (quoting *Bernard* v. *Binnings Constr. Co.*, 741 F.2d 824, 829 (5th Cir. 1984)). The district court entered summary judgment in favor of respondent, holding that the *Super Scoop* was not a vessel in navigation because "the primary purpose of this thing, of this [*Super Scoop*] is dredging, not transportation" and "[t]he fact that it moves people across the water is incidental to its primary purpose." Pet. App. 66.

4. a. On petitioner's interlocutory appeal pursuant to 28 U.S.C. 1292(a)(3), the court of appeals affirmed. Pet. App. 15-29. The court concluded that it was bound by *DiGiovanni*, *id.* at 22-25, and held that "a dredge like the [*Super Scoop*] comes within the * * * court's holding in *DiGiovanni*," *id.* at 26. The court rejected petitioner's argument that "dredging itself is a form of navigation and transportation" because "to dredge, the *Super Scoop* must transport the clamshell bucket and associated equipment across the harbor, and must cause the dredge material to be carried out to sea." *Id.* at 26-27. The court of appeals reasoned that the analysis in *DiGiovanni* "focuses on *primary* functions and, at bottom, dredging is primarily a form of construction" and that "[a]ny navigation or transportation that may be required is incidental to this primary function." *Id.* at 27. The court concluded that the *Super Scoop* was a "floating stage[] used primarily as [an] extension[] of the land for purpose of securing heavy equipment to construct a passage across the sea," and therefore was not "a vessel in navigation within the jurisprudence of the Jones Act." *Ibid.*

The court of appeals also rejected petitioner's reliance on the court's recognition in *DiGiovanni* that workers connected to a structure whose primary purpose is not navigation may nonetheless be considered seamen if the structure "'is in actual navigation or transit' at the time an injury occurred." Pet. App. 28 (quoting 959 F.2d at 1123). The court found it "irrelevant" that petitioner was injured on the scow while the scow was in motion because petitioner's "status as a seaman depends upon the movement *vel non* of the *Super Scoop*" at the time of injury. *Ibid.*

b. On remand, the district court entered summary judgment in favor of respondent on petitioner's alternative claim that respondent was liable for negligence as an owner of a "vessel" under the LHWCA, 33 U.S.C. 905(b). Pet. App. 4. The court of appeals observed that respondent had conceded

that the *Super Scoop* was a "vessel" for purposes of Section 905(b), explaining that "the LHWCA's definition of 'vessel' is 'significantly more inclusive than that used for evaluating seaman status under the Jones Act.'" *Id.* at 5 (quoting *Morehead* v. *Atkinson-Kiewit*, 97 F.3d 603, 607 (1st Cir. 1996) (en banc)). The court nonetheless affirmed the district court's conclusion that respondent's alleged negligence was committed in respondent's capacity as an *employer* and thus respondent was not liable as an owner of a vessel under 33 U.S.C. 905(b). Pet. App. 5-14.

SUMMARY OF ARGUMENT

A. The term "vessel" should be given its generally established maritime meaning at the time Congress passed both the Jones Act in 1920 and the LHWCA shortly thereafter in 1927. At that time, a "vessel" was commonly defined with reference to the generic definition of the term to "include[] every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. 3. Congress also passed both statutes against the background of maritime case law similarly construing the term "vessel" to include all floating structures that have a transportation function or practical capability and that do not serve in effect as an extension of land.

There is no reason for a different construction of the term "vessel" for purposes of the Jones Act and the LHWCA. Indeed, shortly after passage of the LHWCA, this Court in *Norton* v. *Warner Co.*, 321 U.S. 565, 571 & n.4 (1944), relied on 1 U.S.C. 3 and general maritime case law in holding that a barge was a vessel for purposes of the seaman exclusion under the LHWCA "even when [the barge] has no motive power of its own, since it is a means of transportation on water."

B. The court of appeals erred in determining that respondent's dredge, the *Super Scoop*, was not a vessel in navigation for purposes of determining petitioner's status as a seaman under the Jones Act. The term "vessel" does not require a watercraft to have as its "primary" purpose a transportation function. Rather, the correct test under 1 U.S.C. 3 and general maritime law is whether the craft serves or is practically capable of serving a waterborne transportation function such that it is not merely in effect an extension of land. Nor does a watercraft's status as a vessel depend on whether the craft is "in transit" at the time a worker is injured. Adoption of such a regime would produce inequitable, unpredictable, and arbitrary results as it would cause workers regularly exposed to the perils of navigation to move in and out of seaman status depending on the fortuitous circumstance of whether the watercraft was in motion at the time of injury.

Nothing in the requirement that the vessel be "in navigation" (*Chandris*, 515 U.S. at 373) supports the court of appeals' focus on a watercraft's "primary" function or its engraftment of an "in transit" requirement for "vessel" (and thus "seaman") status. A watercraft that serves a transportation function *is a vessel*, and once she is placed in service, she remains *in navigation* until such time as the vessel is removed from service for a significant period of time. *Id.* at 373-374.

Summary judgment for respondent was in error because the undisputed facts demonstrate that the *Super Scoop* was a vessel in navigation at the time of petitioner's injury. She served as a "means of transportation on water," 1 U.S.C. 3, as she transported equipment and crew across the Boston Harbor to perform her work of dredging. It is implausible to characterize the *Super Scoop* as an essentially land-based structure, because her ability to transport machinery over water from her home port to the site of the dredging project, as well as to carry equipment and crew along the course of the project, were essential to her ability to dredge. Because

the *Super Scoop* regularly moved across the navigable waters of the Boston Harbor, her workers were exposed to the perils of navigation such as the type of collision with another vessel that occurred in this case.

C. The conclusion that the *Super Scoop* is a vessel is supported by the settled view, at the time Congress passed both the LHWCA and Jones Act, that dredges were vessels. Indeed, this Court held in *Ellis* v. *United States*, 206 U.S. 246, 259 (1907), that "floating dredges" operating in Boston Harbor were "vessels" whose workers were "seamen as that name commonly is used." There is no indication in either statute that Congress intended to depart from that decision or the numerous similar decisions of the lower courts holding dredges to be vessels given their waterborne transportation of equipment and crew. Quite to the contrary, the legislative history of the LHWCA indicates that Congress understood that dredges were vessels whose workers were seamen entitled to sue under the Jones Act.

ARGUMENT

RESPONDENT'S DREDGE TRANSPORTED EQUIPMENT AND CREW OVER WATER AND WAS THEREFORE A "VESSEL IN NAVIGATION"

The court of appeals held that, for purposes of coverage under the Jones Act, "a vessel in navigation" includes only those watercraft whose "primary" purpose is navigation or transportation, unless the watercraft at issue was "in actual navigation or transit" at the time of the injury. Pet. App. 27. The court of appeals' decision departs from two well-established principles of maritime law at the time of the passage of the LHWCA in 1927 and the Jones Act in 1920. *First*, the general maritime definition of a vessel includes a watercraft that is a means of transportation on water, regardless of her "primary" purpose or state of transit at any given point in time. *Second*, maritime law has long

considered a dredge to be a vessel whose critical purpose and function is waterborne transportation of crew and equipment. Because the dredge at issue in this case, the *Super Scoop*, transported machinery to Boston Harbor for the "Big Dig" project and transported crew and equipment as she dredged a trench, the dredge was a vessel in navigation under the Jones Act.

A. "Vessel" Should Be Interpreted In Accordance With Its General Maritime Meaning Of A Watercraft That Is A Means Of Transportation On Water

Although Congress did not define the term "seaman" when it enacted the Jones Act in 1920, it gave "content" to the term in 1927 when it passed the LHWCA and excluded from the Act's coverage a "master or member of a crew of any vessel," 33 U.S.C. 902(3)(G), a phrase Congress intended to encompass Jones Act seamen, *i.e.*, those workers with an "employment-related connection to a vessel in navigation." *Chandris*, 515 U.S. at 357. Neither the Jones Act nor the LHWCA provides a meaningful definition of "vessel."[2] The

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[2] The Jones Act does not employ the term "vessel." 46 U.S.C. App. 688(a). The LHWCA contains a definition of "vessel" that provides:

> Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. 902(21). Unlike the master or crew member provision of 33 U.S.C. 902(3)(G), which was enacted as part of the original 1927 Act, the quoted definition was adopted as part of the 1972 Amendments to the Act (Act of Oct. 27, 1972, Pub. L. No. 92-576, § 18(a), 86 Stat. 1263) in conjunction with the third-party vessel owner provision of 33 U.S.C. 905(b). The definition elaborates on the persons who can be held responsible for

term "vessel," however, is a maritime term of art, and in the absence of a contrary indication Congress can be assumed to have intended it to have its established meaning "under the general maritime law." *Wilander*, 498 U.S. at 342; see *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267, 275 (1994) (interpreting "burden of proof" "to have the meaning generally accepted in the legal community at the time of enactment"). Thus, the term "vessel" should be given its generally established meaning as of the time that Congress passed the Jones Act in 1920 and "refine[d]" its meaning in 1927 through passage of the LHWCA. *Wilander*, 498 U.S. at 347; see *id.* at 342 (assessing state of maritime law at time of Jones Act, and concluding that it did not require a seaman's duties to aid in the navigation of the vessel), 348 (determining that the LHWCA did not change existing maritime rule).

1. *The statutory definition of vessel*

The appropriate starting point for determining whether a watercraft is a "vessel" is the general definition set forth in 1 U.S.C. 3, entitled "'Vessel', as including all means of water transportation." Under this Rules of Construction definition, "[t]he word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. 3. That definition was first used by Congress in an anti-smuggling statute, Act of July 18, 1866, ch. 201, § 1, 14 Stat. 178, and was incorporated into Section 3 of the Revised Statutes in 1874, well before the passage of both the Jones Act and the LHWCA. Congress has regularly employed the

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the negligent operation of a vessel, but provides no guidance on the requisite elements of a "vessel" itself. *McCarthy* v. *The Bark Peking*, 716 F.2d 130, 133 (2d Cir. 1983) (LHWCA's definition of vessel is "circular" and "[o]bviously * * * does not provide precise guidance"), cert. denied, 465 U.S. 1078 (1984).

definition in 1 U.S.C. 3 "for the purpose of determining the scope of various shipping and maritime transportation laws." *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 676 (1982).[3]

There is no indication in either the Jones Act or the LHWCA that Congress intended to depart from the generic definition of vessel in Title 1. To the contrary, this Court has already applied 1 U.S.C. 3 in a case arising under the LHWCA. In *Norton* v. *Warner Co.*, *supra*, the Court held that a bargeman was a "member of the crew of a[] vessel," 33 U.S.C. 902(3)(G), and was therefore a "seaman" excluded from coverage of the Act. The barge in that case "had no motive power of its own, and was moved either by towing or for shorter distances, by the winding up of a cable," and "never went to sea but was confined in its operation to waters within a radius of thirty miles of Philadelphia." 321 U.S. at 567. Citing 1 U.S.C. 3 and various general maritime decisions, the Court held that "a barge is a vessel within the meaning of the Act even when it has no motive power of its own, since it is *a means of transportation on water.*" 321 U.S. at 571 & n.4 (emphasis added). *Norton* accordingly stands for the proposition that the 1 U.S.C. 3 definition of "vessel" supplies the applicable standard for determining the scope of coverage of the LHWCA (and thus the Jones Act as well).[4]

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[3] Similar definitions are employed in other statutes. See 16 U.S.C. 916(e); 18 U.S.C. 553(c)(3); 18 U.S.C. 3667; 19 U.S.C. 1401(a); 22 U.S.C. 456(c); 26 U.S.C. 5688(c); 33 U.S.C. 1321(a)(3); 33 U.S.C. 1502(18); 33 U.S.C. 1601(1); 33 U.S.C. 2003(a); 33 U.S.C. 2402(11); 33 U.S.C. 2701(37); 42 U.S.C. 201(i); 42 U.S.C. 9601(28); 46 U.S.C. App. 801; 47 U.S.C. 153(39)(A); 49 U.S.C. 80301(3); 49 U.S.C. 13102(21).

[4] The definition of "vessel" does not sweep in every structure theoretically capable of serving in some fashion as a conveyance over water at some point. In *Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co.*, 271 U.S. 19, 22 (1926), the Court held that a wharfboat secured to the shore by cables was not a vessel under 1 U.S.C. 3 because

2. *The traditional maritime law understanding of "vessel"*

The statutory definition of "vessel" is consistent with the use of the term at maritime law to include all watercraft that have a transportation function or practical capability and to exclude watercraft that function as an extension of land. 1 Steven F. Friedell, *Benedict on Admiralty* § 165, at 10-10 (7th ed. 2003) ("There is no legally significant difference between the statutory definition of the term 'vessel' and the meaning attributed to it by the general maritime law as obtaining in this country."). Thus, it was well-settled by the time of the passage of the Jones Act and the LHWCA that the salient factor in determining whether a structure was a vessel was whether the structure was "an instrument of naval transportation." 1 Erastus C. Benedict, *The American Admiralty* § 53, at 74 (5th ed. 1925); Robert M. Hughes, *The*

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the wharfboat "was not practically capable of being used as a means of transportation." The Court further explained:

> It served * * * as an office, warehouse and wharf, and was not taken from place to place. The connections with the water, electric light and telephone systems of the city evidence a permanent location. It performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed.

Ibid. Similarly, the Coast Guard, which regulates vessels as defined in 1 U.S.C. 3 (see 46 U.S.C. 2101(45)), has explained that a "vessel taken out of transportation and permanently moored (or a PMV) falls somewhere between a statutory definition of a vessel and a building or land structure and is deemed to be substantially a land structure" that is best regulated by "appropriate standards enforced by local building codes, fire marshals and other jurisdictions." 2 U.S. Coast Guard, *USCG Marine Safety Manual* B4-44 (2000) (internal quotation marks omitted). "Some examples of such PMVs are showboats, theaters, hotels, gaming sites, restaurants, museums, and business offices on a barge." *Ibid.*

Handbook of Admiralty Law § 5, at 14 (2d ed. 1920) ("The character of craft included in the admiralty jurisdiction is any movable floating structure capable of navigation and designed for navigation.").

For instance, in *Cope* v. *Vallette Dry Dock Co.*, 119 U.S. 625, 627 (1887), this Court held that a drydock, a "fixed structure" "permanently moored" to shore, was not a vessel subject to maritime salvage, because the drydock "was not designed for navigation, and could not be practically used therefor." The Court also observed that a ferry bridge, hinged or chained to a wharf, and a floating meeting house, kept in place by surrounding pilings were "in the same category." *Ibid.*; cf. *Rodrigue* v. *Aetna Cas. & Sur. Co.*, 395 U.S. 352, 359-360 (1969) (treating fixed artificial island drilling platforms not as vessels subject to admiralty law).

By contrast, in *The Robert W. Parsons*, 191 U.S. 17, 29-34 (1903), the Court held that a canal boat drawn by horse power was a vessel subject to admiralty jurisdiction, and in so ruling explained that "neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged." *Id.* at 30. The craft's "purpose" and "business," the Court explained, must be that of navigation, *id.* at 31, *i.e.*, any carriage of persons or property on water. Thus, the Court observed that the term had been broadly held to include "steamers * * * engaged in carrying freight and passengers * * *, a barge, without sails or rudder, used for transporting grain, [and] a floating elevator." *Id.* at 30 (citations omitted). The Court concluded that a canal boat, a structure "engaged in commerce and navigation," *id.* at 31, was distinct from land-like structures such as a "dry dock," "ferry bridge or sailors' floating meeting house," which were "no more used for the purposes of navigation than a wharf or a warehouse projecting into or upon the water, *id.* at 34.

B. The Court Of Appeals Erred In Applying Its "Primary Function" and "Actual Transit" Test To Conclude That Respondent's Dredge Was Not A Vessel In Navigation

The court of appeals entered summary judgment on the question of the *Super Scoop*'s vessel status by employing a standard under which a floating watercraft is not a vessel in navigation unless its "primary" function is navigation or transportation, or it is "in actual navigation or transit" at the time of a worker's injury. Pet. App. 23, 27. Applying that standard, the court of appeals concluded that the *Super Scoop* was not a vessel in navigation even though it "moved with some regularity across navigable waters" and "possessed the commonly understood characteristics of a vessel," such as compliance with the regulations of the Coast Guard that apply to vessels. *Id.* at 26 n.3, 27. The court of appeals reached that result by reasoning that "dredging is primarily a form of construction" and that "[a]ny navigation or transportation that may be required is incidental to this primary function." *Id.* at 27. That analysis was flawed in several respects.

1. *The court of appeals' standard was erroneous*

Nothing in the statutory definition of vessel in 1 U.S.C. 3 or the general understanding of the term at maritime law at the time Congress passed the Jones Act and the LHWCA requires a court to determine a watercraft's "primary" function or whether the craft "is in transit" at a particular point in time. Pet. App. 27. Under the statutory definition and the settled meaning of the term before the passage of the Jones Act and the LHWCA, the correct test is instead a simple, bright-line inquiry into whether the watercraft has a waterborne transportation function or practical capability. A watercraft that meets that test is a vessel, and she is not deprived of that status simply because she performs other

functions, such as serving as a workplace or work platform for workers to perform their duties (such as fishing or diving for treasure or salvage). *Manuel* v. *P.A.W. Drilling & Well Serv., Inc.*, 135 F.3d 344, 351 (5th Cir. 1998) ("[A] vessel can serve the dual function of transporting cargo, equipment, or persons across navigable waters and acting as a work platform.").

The fact that a watercraft may be temporarily stationary likewise does not change the fundamental character of the watercraft as a waterborne means of transportation. Thus, in *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 535 (1995), the Court held that an anchored barge was within federal admiralty jurisdiction: "Even though the barge was fastened to the river bottom and was in use as a work platform at the times in question, at other times it was used for transportation." Cf. *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370, 372 (1957) (upholding finding that worker on dredge was seaman under Jones Act even though "the dredge was anchored to the shore at the time of petitioner's injury" and "this dredge, like most dredges, was not frequently in transit"; vessel status was not at issue). Nothing in the statutory definition, the general maritime law, the Jones Act, or the LHWCA provides any justification for limiting "vessel" status to a watercraft whose "primary" function is navigation. A focus on a watercraft's "primary" purpose (and whether its transportation function is "incidental" to that purpose), moreover, would add a layer of unnecessary complexity for courts adjudicating claims under both statutes, as well as for the Department of Labor that administers the "master or member of a crew" exclusion under the LHWCA.

This Court has construed the Jones Act and the LHWCA to require an employment-related connection to a vessel "in navigation," *Wilander*, 498 U.S.C. at 354; *Chandris*, 515 U.S. at 373, but the "in navigation" requirement also does not

require a vessel to be "in transit" at the time of a worker's injury or to have as its "primary" purpose that of navigation. The "in navigation" requirement does not "narrowly or literally" require a vessel to be in motion or "navigating in an operational sense" at a given point in time; rather, it requires a vessel generally to have been placed in, and to remain in, service. 1 Robert Force & Martin J. Norris, *The Law of Seamen* § 2:17, at 2-91 (5th ed. 2003) (*Law of Seamen*).

Thus, "a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside." *Chandris*, 515 U.S. at 373 (quoting *DiGiovanni*, 959 F.2d at 1121). Rather, the vessel is "in navigation, although moored to a dock, if it remains in readiness for another voyage." *Id.* at 374 (quoting 2 *Law of Seamen* § 30.13, at 364 (4th ed. 1985)). Indeed, a vessel remains "in navigation" when placed in drydock or a shipyard for minor repairs. *Ibid.*; 1 *Law of Seamen*, 2-91.[5] Accordingly, a watercraft that serves as a means of transportation on water is a vessel and she remains in navigation as long as she is in service, notwithstanding the fact that at various times she serves as a stationary workplace for her crew.[6]

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[5] "At some point, however, repairs become sufficiently significant that the vessel can no longer be considered in navigation." *Chandris*, 515 U.S. at 374; see, *e.g.*, *West* v. *United States*, 361 U.S. 118, 122 (1959) ("The *Mary Austin*, as anyone could see, was not in maritime service. She was undergoing major repairs and complete r:novation."); *Roper* v. *United States*, 368 U.S. 20, 21, 23 (1961) (SS *Harry Lane* had "withdrawn from navigation" when she "was deactivated from service and 'mothballed'" and "lost her Coast Guard safety certification as well as her license to operate."); cf. 46 C.F.R. 90.05-1(a)(1) (exempting from Coast Guard regulations "[a]ny vessel while laid up and dismantled and out of commission").

[6] The question presented seeks the Court's resolution of "[w]hat is the legal standard for determining whether a special purpose watercraft (such as a dredge) is a Jones Act 'vessel'" (Pet. i) and does not expressly mention the "in navigation" requirement. The phrase "Jones Act 'vessel'" is best understood, however, as synonymous with a "vessel in navigation." In any event, because (a) the court of appeals framed the issue as whether the *Super Scoop* was a "vessel in navigation" (Pet. App. 20-29), (b) the body of the petition raises the issue (Pet. 6-7 n.3), and (c) the "in navigation" requirement is so intertwined with the vessel-status of a watercraft, the issue of whether the *Super Scoop* was "in navigation" is fairly encompassed within the question presented. Sup. Ct. R. 14.1(a); *e.g.*, *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 540 (1999); *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996); *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 382 (1995).

The court of appeals' focus on whether a watercraft is "in actual navigation or transit" at the time of injury also conflicts with the "fundamentally status based" inquiry under the Jones Act. *Chandris*, 515 U.S. at 361. "In evaluating the employment-related connection of a maritime worker to a vessel in navigation, courts should not employ a 'snapshot' test for seaman status, inspecting only the situation as it exists at the instant of injury; a more enduring relationship is contemplated in the jurisprudence." *Id.* at 363 (internal quotation marks omitted). A contrary regime would "engraft[] upon the statutory classification of 'seamen' a judicial gloss so protean, elusive, or arbitrary as to permit a worker to walk into and out of coverage in the course of his regular duties." *Ibid.* (internal quotation marks omitted). Indeed, *Chandris* also makes clear that "maritime workers who obtain seaman status" do not automatically lose their status simply because they are injured *off* the ship. 515 U.S. at 360. *A fortiori*, a worker with a sufficient connection to a watercraft that is a vessel does not lose his seaman status simply because the craft is not in movement at the time of the injury.

The standard employed by the court of appeals, however, permits a craft to move in and out of vessel status depending on whether the craft is in transit, even though the worker may be performing the exact same functions and exposed to

the same water-based risks whether or not the craft is in motion at the time of an accident. *DiGiovanni*, 959 F.2d at 1128 (Torruella, J., dissenting) (majority's standard would "lead to much uncertainty as the same object may be a vessel or non-vessel from moment to moment" and the "same person, doing the same work, on the same object will receive different legal treatment depending on a totally fortuitous condition"). Thus, had petitioner been injured on the *Super Scoop* while it was in transit anywhere in the Boston Harbor, he would apparently have been considered a seaman. The court of appeals' regime therefore undermines the "interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act (and, perhaps more importantly for purposes of the employers' workers' compensation obligations, who will be covered by the LHWCA) before a particular work day begins." *Harbor Tug & Barge*, 520 U.S. at 558 (quoting *Chandris*, 515 U.S. at 363).

2. *The* Super Scoop *was a vessel in navigation*

The court of appeals erred in holding that no trier of fact could conclude that the *Super Scoop* was a vessel in navigation. The undisputed facts show the contrary: the *Super Scoop* was a watercraft that was in service as a "means of transportation on water." 1 U.S.C. 3. Respondent used the *Super Scoop* not only as a means of transporting equipment from worksite to worksite but also as a means of transporting equipment and crew as she moved through the Boston Harbor to conduct the dredging operations. As the First Circuit recognized, the *Super Scoop*'s "function was *to move* through Boston Harbor, from East Boston to South Boston, digging the ocean bottom as it moved." Pet. App. 2 (decision following remand, emphasis added); accord Dan McNichol, *The Big Dig* 56 (2000) ("The Super Scoop's mission: to begin digging a 50-foot-deep, 100-foot-wide, 3/4-mile-long trench below the surface of Boston Harbor."). To that end, "[t]he

Super Scoop typically move[d] once every two hours, covering a distance of thirty to fifty feet." Pet. App. 17; see generally 9 *The Encyclopedia Americana*, *supra*, at 374 ("After the dredge has removed all of the material it can reach," and spuds holding the dredge in place are raised, "the dredge is moved ahead 5 to 10 feet * * * to the next position by pulling on anchor lines, by placing the dipper ahead and drawing in on it, or by using a tug."). That "mobility was essential to the work it was designed and built to perform." *Manuel*, 135 F.3d at 351.

The court of appeals thus erred in concluding that the *Super Scoop* served as an "extension of land" because "at bottom, dredging is primarily a form of construction." Pet. App. 27. That reasoning erroneously conflates the status of a vessel as a waterborne means of transportation with the particular use or purpose for which the vessel and her equipment and workers are employed. "The art of dredging refers to the submarine excavation of soils (sediment) and bedrock, and a dredger can be regarded as a vessel incorporating specialised machinery for such an operation." *Conway's History of the Ship: The Shipping Revolution* 147 (Conway Maritime Press 1992); accord 9 *The Encyclopedia Americana*, *supra*, at 373 (A dredge is "a barge or other vessel equipped for digging mud, sand, rock, and other deposits from the bottoms of waterways. The major purpose of dredging is to maintain clear channels."); Alfred Dudszus & Ernest Henriot, *Dictionary of Ship Types* 94 (Conway Maritime Press 1986) (giving history of a dredger and defining it as "[a] vessel designed for scouring and deepening channels and anchorages * * *; it carried machinery powered by men or natural forces to enable it to carry out its tasks").

Here, respondent may have been engaged in a project relating to the construction of the Ted Williams Tunnel, but it used a vessel to complete the job. The *Super Scoop* operated away from shore and its mobility over water was

essential to its purpose and use. It cannot be said that the *Super Scoop* "performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land." *Evansville & Bowling Green Packet Co.* v. *Chero Cola Bottling Co.*, 271 U.S. 19, 22 (1926). Quite to the contrary, it is difficult to imagine how the *Super Scoop* would have been of any utility to respondent without the ability to transport its machinery, equipment, and crew across the Boston Harbor.

Presumably for the above reasons, respondent concedes that the *Super Scoop* is a "vessel" whose owner may be liable for negligence to longshoremen under 33 U.S.C. 905(b). Pet. App. 5; Br. in Opp. 4-5. But the term "vessel" should have the same meaning in the seaman exclusion of Section 902(3)(G) of the same Act, under the presumption that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995). The First Circuit has suggested that Section 905(b) may have a broader scope than the seaman exclusion under Section 902(3)(G) because the latter provision, as construed by this Court in *Wilander*, 498 U.S. at 354, requires a vessel to be "in navigation." *Morehead*, 97 F.3d at 607 & n.3. Presumably, however, Section 905(b) similarly carries with it an "in navigation" requirement. See *Richendollar* v. *Diamond M. Drilling Co.*, 819 F.2d 124, 125, 127-128 (5th Cir.) (holding that a jackup drilling rig "positioned [in shipyard] on blocks, on land" that "was approximately 85% complete" on date of accident was "not a vessel within the admiralty jurisdiction of the federal courts and thus not covered by Section 905(b)"), cert. denied, 484 U.S. 944 (1987). In any event, any such distinction would not aid respondent in this case. At the time of petitioner's injury, the *Super Scoop* was plainly "in navigation" since she

was fully operational in her mission to dig a trench across the Boston Harbor.

The conclusion that the *Super Scoop* is a vessel in navigation also is fully consistent with the "clear distinction" Congress drew between "land-based workers" under the LHWCA, "whose employment does not regularly expose them to the perils of the sea," *Chandris*, 515 U.S. at 368, and "sea-based maritime workers" under the Jones Act, who "owe their allegiance to a vessel and not solely to a land-based employer," *Wilander*, 498 U.S. at 348. Petitioner spent "[n]inety-nine percent of his time while on the job" aboard the *Super Scoop* (C.A. App. 27 (Def's Mem. in Support of Sum. J.)) in navigable waters of the United States and was subject to the same risks of injury as other seamen. Indeed, petitioner was injured in a traditional maritime accident when the *Super Scoop* collided with one of its scows in the Boston Harbor. Compare *The Virginia Ehrman*, 97 U.S. 309, 310 (1878) (owner of a steam-dredge was an owner of a vessel who was entitled to recover under admiralty law when it collided with two other vessels while dredge was "carefully and skillfully anchored, with three anchors properly set to keep her in position to prosecute her work"). Moreover, because petitioner worked as a marine engineer on the *Super Scoop* while she moved equipment and crew across the Boston Harbor, petitioner "encounter[ed] perils of navigation to which craft used for transportation are exposed." *Evansville*, 271 U.S. at 22.[7]

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[7] This Court often has used the phrase "perils of the *sea*" to describe the hazards to which seaman are exposed. *E.g.*, *Harbor Tug & Barge*, 520 U.S. at 560 (emphasis added). That phrase, of course, encompasses the hazards posed by being away from shore in "navigable waters" of the United States. *Swanson* v. *Marra Bros.*, 328 U.S. 1, 7 (1946); see, *e.g.*, *Senko*, 352 U.S. at 372-374 (Mississippi River); *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 38 (1943) (Lake Michigan); *Norton*, 321 U.S. at 567 (vessel "never went to sea").

C. Classifying A Dredge As A Vessel Is Supported By Settled Maritime Law At The Time Congress Passed The Jones Act and LHWCA

1. *Pre-enactment case law*

Congress passed both the Jones Act and the LHWCA against the settled background principle that dredges were vessels whose workers could be seamen. In *Ellis*, *supra*, the Court found that workers on dredges and scows used to dig a portion of a 35-foot channel in the Boston Harbor were "seamen as that name commonly is used" and therefore were excluded from a statute limiting the daily work hours of certain "laborers and mechanics." 206 U.S. at 259. The Court held that "[t]he scows and *floating dredges were vessels*" that "were within the admiralty jurisdiction of the United States." *Ibid.* (emphasis added). The Court relied upon, *inter alia*, Section 3 of the Revised Statutes (1875 ed.) (now codified as 1 U.S.C. 3) and the Court's decision in *The Robert W. Parsons*, *supra*. See 206 U.S. at 259.

The Court in *Ellis*, 206 U.S. at 259, also relied on "[a] number of cases as to dredges in the circuit and district courts" referenced in *Bowers Hydraulic Dredging Co.* v. *Federal Contracting Co.*, 148 F. 290 (S.D.N.Y. 1906). That case in turn had listed eight decisions cited for the proposition that "it is settled law that a court of admiralty has jurisdiction over dredges." *Id.* at 292. Those decisions uniformly treated dredges as vessels. One such case, *Saylor* v. *Taylor*, 77 F. 476, 477 (4th Cir. 1896), was also cited with approval in *Ellis* (206 U.S. at 260), and held that a mud dredge with "no natural powers of propulsion" was a vessel under Section 3 of the Revised Statutes whose workers were entitled to a maritime lien for their services. The Fourth Circuit explained that the dredge's occupation was to "transport from place to place the steam shovel placed upon her * * * and the engine and hands employed on her, and

to maintain them afloat in her work of deepening channels in navigable waters."[8] Another such case was the Third Circuit's decision in *The International*, 89 F. 484 (1898), which likewise held that a dredge was a vessel under Section 3 of the Revised Statutes because the dredge's "permanent home was on navigable water, and it was intended and adapted for navigation and transportation by water of its crew, supplies and machinery, from point to point, in carrying on the work of deepening and removing obstruction from channels and harbors in aid of navigation and commerce." *Id.* at 485.

The remaining decisions cited in *Bowers Hydraulic Dredging Co.* are to similar effect. See *McMaster* v. *One Dredge*, 95 F. 832, 834 (D. Or. 1899) ("a dredge capable of being moved from place to place on navigable waters, and of the transportation to place of machinery, or sand and gravel taken from the bottom of rivers, is a vessel, and * * * subject to [an admiralty] lien" for materials and supplies); *McRae* v. *Bowers Dredging Co.*, 86 F. 344, 348 (D. Wash. 1898) (dredge is a maritime vessel subject to a lien for wages earned by its workers; dredge "has mobility, and her element is the water. She can be used afloat, and not otherwise. She has carrying capacity, and her employment has direct reference to commerce and navigation"); *The Starbuck*, 61 F. 502 (E.D. Pa. 1894) ("That a dredge and her

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[8] The court observed:

> [I]t seems a stretch of the imagination to class the deck hands of a mud dredge in the quiet waters of a Potomac creek with the bold and skillful mariners who breast the angry waves of the Atlantic; but such and so far-reaching are the principles which underlie the jurisdiction of the courts of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world.

Saylor v. *Taylor*, 77 F. at 479.

scows are to be treated as one concern, and are subject to the admiralty jurisdiction has been several times decided, and I think rightly."); *The Atlantic*, 53 F. 607, 608 (D. S.C. 1893) ("Dredges and scows are subject to a maritime lien for services rendered."); *Aitcheson* v. *The Endless Chain Dredge*, 40 F. 253, 254 (E.D. Va. 1889) ("As to the question whether a steam-dredge, which is a floating scow fitted with steam appliances, buckets, and scoop, for deepening channels of navigation and like purposes, is a subject of admiralty jurisdiction, there have been repeated decisions in the United States and Great Britain in the affirmative."); *The Pioneer*, 30 F. 206, 207 (E.D.N.Y. 1886) (dredge was "used in naval transportation when she transported from place to place the steam-shovel and engine and maintained the same afloat on navigable water"); *The Alabama*, 22 F. 449, 451 (S.D. Ala. 1884) (finding that a dredge and her two scows were together engaged in the business of "transportation by water-craft" and that dredge alone is a vessel because it "navigated from one place to another" and "remov[ed] obstructions in the way of commerce by water").[9]

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[9] There were additional decisions pre-dating the Jones Act and the LHWCA that had held a dredge to be a vessel. *E.g.*, *Richmond Dredging Co.* v. *Standard Am. Dredging Co.*, 208 F. 862, 866 (9th Cir. 1913) (holding that a dredge "is the subject of admiralty jurisdiction"); *North Am. Dredging Co.* v. *Pacific Mail S.S. Co.*, 185 F. 698, 702 (9th Cir. 1911) ("A floating dredger capable of carrying her own machinery and implements and working crew, when employed as an aid to commerce in deepening navigable channels and harbors, is subject to the maritime law."); *The Steam Dredge No. 6*, 222 F. 576 (S.D.N.Y. 1915) ("though the dredge had no motive power, * * * she nevertheless was used at the time of the mishap in deepening the waterway for vessels engaged in interstate commerce and was carrying her machinery from place to place, and was therefore subject to maritime liens and risks"); see Hughes, *supra*, at 15 (observing that there are "many cases extending the jurisdiction over dredges," including "those which lift the mud by dippers, and deposit it in scows to be towed away"); see also *City of L.A.* v. *United Dredging Co.*, 14 F.2d 364, 366 (9th Cir. 1926) (dredges are vessels, and engineers employed upon them are "clearly seamen" within the meaning of federal statutes, and thus beyond the authority of city licensing ordinances) (cited with approval in *Norton*, 321 U.S. at 571); cf. *In re Hydraulic Steam Dredge No. 1*, 80 F. 545, 556 (7th Cir. 1897) (declining to resolve whether the term "vessel" encompassed a steam dredge that discharged material through pipes upon shore for the creation of a land embankment but concluding contract at issue was not maritime in nature).

Congress in passing both the Jones Act and the LHWCA was presumably aware of the Court's decision in *Ellis* and the numerous decisions of the lower courts holding that dredges were vessels. Congress accordingly must have intended that a dredge could be a vessel whose workers were seamen excluded under the LHWCA and therefore covered under the Jones Act. *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988) (interpreting statute in light of "well-settled presumption that Congress understands the state of existing law when it legislates"); see *Wilander*, 498 U.S. at 342 ("[W]e assume that when a statute uses [a maritime term of art], Congress intended it to have its established meaning.").[10]

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[10] As indicated in the text, some of the early decisions involved dredges that had deepened or widened harbors and rivers for navigation by other vessels, whereas the *Super Scoop* was deepening and widening the Boston Harbor for the placement of a vehicular tunnel. None of the early decisions, however, indicates that the vessel status of a dredge depended on its use in *aiding* the transportation function of *other vessels*, and the statutory definition in 1 U.S.C. 3 imposes no such requirement. Rather, the inquiry is whether the dredge is a means of water transportation. *McMaster*, 95 F. at 833 ("The reason * * * for holding that the dredge [i]s a vessel * * * is because she [i]s constructed so as to move from place to place upon navigable waters."). Moreover, any standard that would turn on the specific purpose for which the dredge was deepening or widening a body of navigable water would create the type of "snapshot" regime eschewed in *Chandris*, 515 U.S. 363, by making a dredge's vessel status vary from project to project, even though a worker's connection to the vessel, and risks from the perils of navigation, may remain the same.

2. *The legislative history of the LHWCA*

Classifying a dredge as a vessel is also consistent with the legislative history of the LHWCA. The bill that became the LHWCA, S. 3170, "originally excluded a master or members of a crew of a vessel, but was amended so as to extend to them the benefits of compensation." *Nogueira* v. *New York, New Haven & Hartford R.R.*, 281 U.S. 128, 136 (1930); see H.R. Rep. No. 1767, 69th Cong. 2d Sess. 20 (1927). The House thus reported a bill that would have included seamen by extending the coverage of the Act to "any maritime employment performed * * * [a]s master or member of a crew of a *barge, lighter, tug, dredge, vessel, or other ocean, lake, river, canal, harbor, or floating craft.*" *Id.* at 2 (emphasis added). As the House Report explains, the bill was drafted "so as to provide the benefits of compensation to seamen, or, to use the language of the bill, 'to masters and members of the crew.'" *Id.* at 20. After the seamen affected by the bill expressed their bitter opposition to their inclusion in the Act and preference for retaining their remedies under the Jones Act, the House amended the bill, and Congress passed the final bill to exclude "a master or a member of a crew of any vessel." 68 Cong. Rec. 5403, 5900, 5908 (1927); *Nogueira*, 281 U.S. at 134; *Warner* v. *Goltra*, 293 U.S. 155, 160 (1934).

Although the final language of the Act excluded seamen by employing the phrase "any vessel" instead of the earlier phrase "a barge, lighter, tug, dredge, vessel, or other ocean, lake, river, canal, harbor, or floating craft," Congress presumably intended that the shorter and equally comprehensive phrase "*any* vessel" would encompass all of the illustrative watercraft included in the House version of the bill, such as barges, tugs, and dredges. In enacting the LHWCA's exclusion of "a master or member of a crew of any vessel," Congress intended to remove from LHWCA cover-

age the same class of workers—seamen—that had been initially included in the bill reported by the House Judiciary Committee. *E.g.*, 69 Cong. Rec. at 5403 (responding to question about committee report's statement that the bill provides compensation benefits to seamen, Rep. Graham stated that "[t]his is an amendment taking the seamen out"). Because the language in the final bill defining seamen was considered to be synonymous with that in the reported bill, the reported bill's reference to a "dredge" is a clear indication that Congress understood that the phrase "any vessel" in the final enactment would include a watercraft such as a dredge. That conclusion is particularly warranted in light of the generally established view under maritime law at the time of the LHWCA's enactment that dredges were vessels. See pp. 24-27, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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v.

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Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the First Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

What is the legal standard for determining whether a watercraft is a Jones Act vessel?

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae* in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.[1]

---

1 Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 lawyer members primarily represent injured plaintiffs in civil actions. The Admiralty Law Section of the Association includes most of the attorneys who specialize in representing plaintiffs in maritime personal injury litigation.

The Jones Act, 46 U.S.C. App. § 688(a), affords a remedy to seamen and their families to seek compensation for injury or death caused during the course of their hazardous work. The issues in this case affect the question of who may qualify as a Jones Act seaman. One of the tenets of ATLA's mission is to preserve the rights of all citizens, including seamen, to legal recourse for injury.

SUMMARY OF THE ARGUMENT

1. In order to qualify as a seaman under the Jones Act, a worker must have a substantial employment connection to a *vessel* in navigation or an identifiable fleet of such vessels. The Jones Act, 46 U.S.C. App. § 688(a), contains no definition of the word "vessel" and the definition found in the Longshore & Harbor Workers Compensation Act, 33 U.S.C. § 902(21), is of no help. This Court's decisions which fashioned the present test for seaman status do not define the term "vessel." *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991). The lower courts' decisions on this subject are mired in confusion and contradiction. There is a need for this Court to provide a clear and straightforward definition of the term "vessel" for the purpose of determining seaman status.

2. The test used by the court below denies Jones Act vessel status to special-purpose vessels whose mission is not primarily transportation of passengers or cargo over navigable waters unless that vessel is in transit at the moment of the worker's injury. This test is untenable because:

A. The artificial distinction it draws between traditional and special-purpose vessels is not supported by logic or by law. There is no principled basis for such a distinction because:

(1) Maritime law has long recognized that there are "myriad purposes for which ships set to sea," *Wilander, supra,* at 344, and the transportation of passengers or cargo over navigable waters is only one of these. Maritime law has long recognized that unconventional as well as traditional vessels serve the varied purposes of maritime commerce.

(2) There is no meaningful difference between traditional and special-purpose vessels insofar as the connection required between the vessel and the crew which serves her. The crews of both are required to have an employment connection to the vessel that is substantial in both nature and duration. The crew members of both are required to contribute to the mission of the vessel.

(3) There is no meaningful difference in the exposure to marine perils suffered by the crews of traditional and special-purpose vessels.

(4) This Court's prior decisions have consistently held or assumed special-purpose craft to be vessels.

B. The test used by the court below focuses on the circumstances existing at the moment of injury and is therefore the kind of "snapshot" test forbidden

by the *Chandris* Court. Thus, the test provides no predictability to employers, workers or insurers as to who, on any given workday, is covered by the Jones Act and who is covered by LHWCA.

3. The definition of the term "vessel" found in 1 U.S.C. § 3, when used in conjunction with the other prongs of the seaman status test established in *Chandris*, is an appropriate test for Jones Act vessel status. 1 U.S.C. § 3 states: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation over water."

4. A separate prong of the test for seaman status set out in *Chandris* requires the vessel to be "in navigation." This Court has made clear that the "in navigation" requirement does not require the vessel to be in transit in order for it to be a vessel. Rather, a vessel is "in navigation" as long as it has not been removed from navigation for such a lengthy period of time that it must be considered out of service. Put another way, a vessel is "in navigation," even if stationary for long periods, as long as it is performing its intended function.

5. A Jones Act vessel is, therefore, any kind of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation. This definition is consistent with this Court's prior decisions; it is clear, straightforward and allows for predictability; it takes into account the great variety of watercraft engaged in maritime commerce and the varied missions in which they participate in maritime commerce; and finally, it serves the underlying policy of the Jones Act.

ARGUMENT

I. THERE IS A NEED FOR A CLEAR AND SIMPLE DEFINITION OF THE TERM "VESSEL"

In its recent decisions addressing the issue of seaman status, this Court has done much to bring clarity and predictability to this difficult area. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991), considered the nature of the work that an individual must do aboard a vessel in order to qualify for the protection of the Jones Act, 46 U.S.C. App. § 688(a). Two starkly different views were presented: that of the Seventh Circuit, which required a worker to aid in the navigation of the vessel in order to be a seaman, *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *cert. den.*, 469 U.S. 1211 (1985), and that of the Fifth Circuit, which granted seaman status to those whose work contributed broadly to the function or mission of the vessel, *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

This Court concluded that the Fifth Circuit in *Robison* had "deciphered" the Court's earlier decisions and "correctly found that . . . this Court was no longer requiring that seamen aid in navigation." The Court found that to be a seaman, a worker must merely "contribut[e] to the function of the vessel or the accomplishment of its mission." *Wilander* at 498 U.S. 354-355, quoting *Robison*, 266 F.2d 769 at 779. While the Court emphasized that the employment-related connection to a vessel was the "key to seaman status," it found it unnecessary to further "define this connection in all details." *Wilander, supra,* at 355.

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995), presented the Court with the opportunity to elaborate on the nature of that connection. This Court again turned to *Robison* for guidance, quoting Judge Wisdom's formulation of the test for seaman status.

> [T]here is an evidentiary basis for a Jones Act case to go a jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

Chandris, supra, at 365-366, quoting *Robison* at 779.

Building upon and refining that formulation, the Court reiterated the requirement that an employee's duties must "contribute to the function of the vessel or the accomplishment of its mission," *Chandris, supra,* at 368, quoting *Wilander, supra,* at 335, which, in turn, was quoting *Robison, supra,* at 779. With respect to the connection requirement, the Court stated: "Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in both its duration and nature." *Chandris, supra,* at 368.

The Court emphasized that the fundamental purpose of the substantial connection requirement is to distinguish between land-based and sea-based employees and to give the added protection of

seamen's remedies to those employees who, because they are sea-based, are exposed to marine perils. *Id.* at 368.

Neither *Wilander* nor *Chandris* described the "vessel" to which the worker must have a substantial connection in order to be a seaman. The Jones Act does not define the term "vessel" and the definition of that term found in the LHWCA is tautological.[2] As is documented in Stewart's Petition for Certiorari, irreconcilable conflict and confusion exist among the various courts that have attempted to define this critical term.

Thus, there is a need for this Court to adopt a definition of the term "vessel" that is consistent with its earlier decisions and true to the fundamental purpose of its *Chandris* test: to fairly distinguish between sea-based and land-based workers. This vessel-status test should be clear, easy to apply, and provide predictability. It should be consistent with the underlying policy of the Jones Act and consistent with existing statutory definitions of the term. Finally, the test should be broad enough to capture the myriad watercraft which now or in the future will be used in maritime commerce and whose crew members are "sea-based" and thus exposed to marine perils.

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[2] "Unless the context requires otherwise, the term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner *pro hac vice*, agent, operator, charter [*sic*], or bareboat charterer, master, officer or crew member." LHWCA, 33 U.S.C. § 902(21).

II. THE PROPOSED STANDARD FOR A JONES ACT "VESSEL"

The definition of "vessel" found in 1 U.S.C. § 3, in combination with the other prongs of the *Chandris* seaman status test, meets these needs and captures the long understood meaning of that term in the general maritime law:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation over water.

1 U.S.C. § 3.

Robison, the landmark Fifth Circuit case utilized and endorsed by this Court in fashioning the *Wilander/Chandris* test for seaman status, also provides guidance for defining the term "vessel" and supports the adoption of 1 U.S.C. § 3 as the appropriate standard. Robison was injured while working as a roughneck aboard a mobile oil drilling rig located in the Gulf of Mexico. The drilling barge, Offshore No. 55, was fitted with retractable legs so that it could be towed into position by tugboats, where the legs would then be lowered to the ocean floor and the rig raised above water level by hydraulic jacks. The rig floor would then be used as a drilling platform. The rig was in this position at the time of Robison's accident.

The defendant argued, *inter alia*, that Offshore No. 55 was not a vessel. *Robison, supra,* at 773 n.3. Judge Wisdom first reviewed *Gianfala v. Texas Company*, 350 U.S. 879 (1955) (*per curiam*) and the four decisions cited therein.[3] He concluded:

> There are common denominators in *Gianfala*, *Basset*, *Summerlin*, *Wilkes*, and *Gahagan* decisions [sic]. (1) The claimants are not ordinarily thought of as 'seamen' aboard 'primarily in aid of navigation,' although they may serve the vessel in the sense that the work they perform fits in with the function the vessel serves. . . . (2) The 'vessels' were not conventional vessels but special-purpose structures that in one case was on the bottom of the sea. In other words, *under the Jones Act a vessel may mean something more than a means of transport on water*.

Robison, supra, at 776 (emphasis added).

After then reviewing a series of other Supreme Court decisions, including *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957); *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1948); and *Butler v. Whiteman*, 356 U.S. 271 (1958), the court issued its test for seaman status quoted above. In that test the court included within the term vessel "special purpose structures not usually employed as a means of transport by water but designed to float on water." *Robison, supra,* at 779. The court in *Robison* recognized that there are many kinds of vessels which serve maritime commerce in a variety of ways and that the transportation of passengers

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[3] *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940); *Summerlin v. Massman Const. Co.*, 199 F.2d 715 (4th Cir. 1952); *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383 (6th Cir. 1953); *Gahagan Const. Corp. v. Armao*, 165 F.2d 301 (1st Cir. 1948).

and cargo is only one. In *Wilander* this Court agreed, noting that there are "myriad purposes for which ships set to sea." 498 U.S. at 344. The broad language of 1 U.S.C. § 3 gives courts the necessary flexibility to appropriately consider the vast array of circumstances under which different kinds of watercraft do their work.

The vessel-status test used by the court below, on the other hand, draws an artificial distinction between craft whose primary purpose is to transport passengers or cargo over water and those special-purpose vessels which serve some other purpose. *Stewart v. Dutra Construction Company, Inc.*, 230 F.3d 461, 476 (1st Cir. 2000), relying on *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992) (*en banc*). According to this test, a vessel which does not have transportation as its primary function is a Jones Act vessel only if it is under way at the time plaintiff is injured. *DiGiovanni, supra,* at 1123. There is no legitimate support in logic or in law for such a distinction.

Both traditional and special-purpose craft must, at some point, move over water to perform their missions, but there are also times in the normal operations of both kinds of craft when they are stationary.[4] A Jones Act vessel does not lose its

[4] The times and circumstances during which these craft are stationary vary widely. For cargo vessels, for example, it may be as short as hours while the vessel is docked or as long as months while the vessel undergoes repairs. For a drilling vessel, it may be as short as a few days while it is re-provisioned between jobs, or weeks while it performs its drilling operations.

status as such merely because it is stationary.[5] While one prong of the *Chandris* test requires a vessel to be "in navigation," 515 U.S. at 368, this Court made it clear that the phrase is not meant in a narrowly literal sense. It does not require the vessel to be under way; a vessel is "in navigation" unless it has ceased to do its normal work for such a lengthy period of time that it must be considered out of service. *Id.* at 372-376. Put another way, a vessel remains "in navigation" even if not under way, as long as it is performing its normal and expected functions on navigable waters.[6]

The vessel in *Chandris* had been placed in dry dock for a six-month refurbishment. *Id.* at 351. The

[5] *See* Robert Force and Martin J. Norris, THE LAW OF SEAMEN ch. 2:11 (5th Ed. 2003), and cases collected therein.

[6] A vessel is in navigation as long as it is performing its work on water, whatever that work is, and retains that status until and unless it is "withdrawn from navigation," *Gonzales v. United States Shipping Board*, 3 F.2d 168, 171 (E.D.N.Y. 1924), or "taken out of service," *Wayne Construction, Inc. v. Lenard*, 1995 WL 309188 at *3 n. 2 (9th Cir. 1994) (unpublished). *See also Leonard v. Transoceanic Sedco Forex*, 189 F. Supp. 2d 627, 629 (S.D. Tex. 2002) (a vessel "is in navigation if it is engaged in its expected duties on navigable waters); *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1063-64 (7th Cir. 1984) (defining "in navigation" as "engaged as an instrument of commerce or transportation on navigable water"); *Fuller v. Pacific Gulf Marine, Inc.*, 1987 WL 17234 at *3, 1998 A.M.C. 470 (E.D. Pa. 1987) (same); *Rogers v. M/V Ralph Bollinger*, 279 F. Supp. 92, 94-95 (E.D. La. 1968) (same); *cf. Lewis v. Roland E. Trego & Sons*, 501 F.2d 372, 374 (4th Cir. 1974) (holding that a construction barge was in navigation "while moored in navigable water to give the workmen access to offshore piling"); *Davis v. Sedco Forex*, 660 F. Supp. 85, 86 (E.D. Pa. 1987) (holding that a floatable oil drilling rig was in navigation while stationary in drilling mode).

district court instructed the jury that, in considering Latsis' time serving aboard the vessel, it was not to consider the time he served during those six months "because during that period of time [the vessel] was out of navigation." *Id.* at 372-373. This Court found the instruction improper and remanded for a trial on the issue of whether the six-month refurbishment was of sufficient length and the repairs of significant magnitude to have removed the vessel from navigation. This Court concluded that the "inquiry whether a vessel is or is not 'in navigation' for Jones Act purposes is a fact-intensive question that is normally for the jury and not the court to decide." *Id.* at 373.

In respect to the other prongs of the *Chandris* test, the distinction drawn by the court below and in *DiGiovanni* between traditional and special-purpose vessels is equally false. The crews of both kinds of vessels must have substantial connections to their craft. The crews of both are exposed to marine perils whether or not the craft is under way. Indeed, as pointed out by the court in *Robison*, the crews of special-purpose vessels sometimes suffer greater risks than their "blue-water" counterparts.

> Many of the Jones Act seamen on these [drilling] vessels share the same marine risks to which all aboard are subject. And in many instances Jones Act seamen are exposed to more hazards than are blue-water sailors. They run the risk of top-heavy drilling barges collapsing. They run all the risks incident to oil drilling.

Robison, supra, at 780.

These marine risks are present whether the special purpose craft is stationary or under way. The facts in this case dramatically illustrate the point.

On the day Stewart was injured, the vessel "lay idle." 230 F.2d at 464. As Stewart attempted repairs on one of the scows attending the dredge, the scow collided with the dredge, causing Stewart to fall headfirst to a deck below. *Id.* at 465.[7]

Thus, in terms of applying the seaman status test set out in *Chandris*, there is no principled basis for distinguishing between vessels whose primary purpose is transporting passengers or cargo and non-traditional vessels which serve some other purpose. A special-purpose vessel, like a traditional vessel, does not lose its Jones Act vessel status merely because it is stationary. A craft, be it traditional or special-purpose, is a Jones Act vessel if it is "used, or capable of being used, as a means of transportation over water" (1 U.S.C. § 3).

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[7] The jurisprudence is replete with cases where seamen have been injured by maritime perils while working on vessels which have been secured. *See, e.g.*: *McFarland v. Justiss Oil Co., Inc.*, 526 So. 2d 1206 (La. App. 1988), where plaintiff fell into the water from a pontoon barge attached to an oil rig; *Miller v. International Diving and Consulting Services, Inc.*, 669 So. 2d 1246 (La. App.1996), where the plaintiff diver was injured when the ladder he was using to board a pipe-laying barge shifted and twisted; *Melancon v. I.M.C. Drilling Mud*, 282 So. 2d 532 (La. App. 1973), where the plaintiff was crushed while trying to transfer large metal containers onto an oil rig from a moored vessel; *Feliciano v. Texaco, Inc.*, 2002 WL 1159700 (E.D. La. 2002), where plaintiff, a crane operator on a spud barge, was injured when a tugboat tied to the barge to help with operations moved prematurely, causing the line to trap plaintiff's leg.

III. THE PROPOSED TEST IS CONSISTENT WITH SUPREME COURT JURISPRUDENCE.

The test proposed by *amicus* is entirely consistent with this Court's cases which, in a variety of circumstances, have either held or assumed special-purpose craft to be vessels. *Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock Co.*, 513 U.S. 527 (1995), considered whether admiralty jurisdiction existed under the Admiralty Extension Act (AEA), 46 U.S.C. App. § 740, which extends admiralty jurisdiction to "all cases of damage or injury, to person or property, caused by a vessel on navigable water." The vessel in question was a crane barge which, when doing its repair work on bridges spanning the Chicago River, was secured by legs or spuds driven into the river bottom. 513 U.S. at 530. This Court held that admiralty jurisdiction existed under the AEA because the damage had been "caused by a vessel [*i.e.*, the spudded-down crane barge]." *Id.* at 535.

In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) (*Gizoni I*), the Court reversed a summary judgment which had declared a shipyard worker who spent most of his time aboard a fleet of "floating barges" not a seaman. The Court held that the barges in question ("several floating barges, including a pontoon barge, two float barges, a rail barge, a diver's barge, and a crane barge," 502 U.S. at 83), could be Jones Act vessels. *Id.* at 92. The summary judgment was found inappropriate on the vessel status issue because plaintiff had alleged sufficient facts to support a jury finding that the barges were vessels.

Senko v. La Crosse Dredging Corp., 352 U.S. 370 (1957), upheld the Jones Act verdict in favor of a "handyman" who was injured on land while the dredge to which he was assigned was tied to shore. The worker's duties were principally to maintain the barge. He lived ashore, went home every night and had never been aboard the dredge while it was being moved.

Gianfala v. Texas Co., 350 U.S. 879 (1955), reversed the Fifth Circuit's denial of seaman status to a crew member of a submersible drilling barge which was, at the time of plaintiff's injury, submerged and secured on the seabed. The drilling barge had ordinarily been moved once a year and the plaintiff had no duties connected to the barge's movement. This Court held that a jury finding in favor of seaman status must be reinstated.

Grimes v. Raymond Concrete Pile Co., 356 U.S. 252 (1948), involved a pile driver employed by a construction company hired to build a permanent offshore radar tower to be fixed to the sea floor. Plaintiff lived and worked on the tower as it was towed some 110 miles out to sea and then assisted in the operations necessary to secure it. During this work, he regularly worked on a nearby construction barge. Plaintiff was injured while being transferred from a tug to the tower. This Court reversed a lower court ruling denying seaman status to the plaintiff and remanded for a jury trial.

Norton v. Warner Co., 321 U.S. 565 (1944), held that a general handyman who worked and lived aboard a barge was excluded from coverage under the LHWCA as a member of the barge's crew. The Court emphasized that plaintiff "had that permanent

attachment to the *vessel* which commonly characterizes a crew." *Id.* at 573. (Emphasis added)

Ellis v. United States, 206 U.S. 246 (1907), involved the criminal prosecution of dredge operators for the violation of a statute which prohibited contractors engaged in federally funded public works projects from permitting their "laborers and mechanics" to work more than eight hours per day. Seamen were excluded from the reach of the statute. The Court reversed the convictions and relied upon 1 U.S.C. § 3 to find that the dredges were vessels and thus those employed aboard them were seamen. *Id.* at 259-260.

IV. THE PROPOSED TEST IS CLEAR AND SIMPLE AND ALLOWS FOR PREDICTABILITY.

A driving force in this Court's creation of the substantial employment connection prong of its seaman status test was to allow employers, workers and insurers "to predict who will be covered by the Jones Act and . . . who will be covered by the LHWCA . . . before a particular workday begins." *Chandris, supra,* at 363. *See also Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 558 (1997). This goal is no less important in the test for vessel status.

The test used by the First Circuit in this case provides no predictability: vessel status hinges on whether, at the moment of the accident, the craft is under way. This is the very kind of "snapshot test" forbidden by the *Chandris* Court. If allowed, it would inevitably result in the "oscillation" between coverage under the Jones Act and LHWCA that this Court was attempting to avoid. *See Chandris*, 515 U.S. at 347. By contrast, the standard set by 1

U.S.C. § 3 is clear, straightforward and easy to apply. It provides the predictability required by *Chandris* and *Papai, supra*.

The definition of "vessel" in 1 U.S.C. § 3 avoids the confusion and contradiction inherent in other tests. An excellent example of this confusion is found in the unfortunate degeneration of the *Robison* test in the Fifth Circuit. Since *Robison*, the test for Jones Act vessel status has evolved into an elaborate and complex multi-layered test which includes a host of considerations including the purpose for which the device was constructed and being used (*e.g.*, whether its "transportation function" was "primary" or "merely incidental"); whether it was moored at the time of the accident and, if so, for how long; and finally, no less than nine additional factors including whether the vessel (1) had navigational aids, (2) had a raked bow, (3) had lifeboats and other life-saving equipment, (4) had bilge pumps, (5) had crew quarters, (6) had Coast Guard registration, (7) moved on a regular basis, (8) had the ability to be refloated, and finally (9) the length of time the structure had been in place. *See, e.g., Bernard v. Binnings Const. Co., Inc.*, 741 F.2d 824, 829-33 (5th Cir. 1984).

The main difficulty with this "test" is that it is so "prolix and flabby" it really is not a test at all.[8] This conclusion is driven home by cases purporting to apply this test to essentially identical facts but reaching opposite results. Compare, for instance, *Sharp v. Johnson Bros. Co.*, 917 F.2d 885 (5th Cir. 1990), and *Ellender v. Kiva Const. and Engineering*,

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[8] David W. Robertson, *The Law of Seaman Status Clarified*, 23 J. Mar. L. & Com. 1, 14-15 (1992).

909 F.2d 803 (5th Cir. 1990), dealing with platform barges. Similarly irreconcilable decisions applying the current Fifth Circuit test are *Manual v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (CA5 1998) and *Hurst v. Pilings and Structures, Inc.*, 896 F.2d 504 (CA11 1990).[9]

Manual, supra, represents the Fifth Circuit's most recent attempt to bring order to the Fifth Circuit chaos. And it does indeed restore some order. But the *Manual* panel could not effect full repairs, and the difficulties in the Fifth Circuit's body of vessel-status doctrine run deep. This is demonstrated by comparing the reasoning of the Fifth Circuit panel in *Manual* with that of the district judge in the same case at 1996 WL 736993 (E.D. La. 1996).

In the district court, Judge Porteous reviewed the facts and, applying the Fifth Circuit's complex vessel-status doctrine, concluded that, *as a matter of law*, the drilling rig in question was *not* a vessel. In the Fifth Circuit, the Court performed the same analysis and concluded, *as a matter of law*, the drilling rig *was* a vessel. These exactly opposite results reached by two conscientious judges looking at the identical facts are a testament to the unworkability of the test they were attempting to apply. The proposed test presents no such difficulties.

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[9] *See* Robertson, *supra* n.8 for a discussion of cases.

V. THE PROPOSED TEST TAKES INTO ACCOUNT THE GREAT VARIETY OF WATERCRAFT ENGAGED IN MARITIME COMMERCE.

The Court in *Wilander* recognized that maritime commerce has been served, from its earliest days, by a limitless variety of craft serving "the myriad purposes for which ships set to sea." *Wilander, supra,* at 344.

> In the early periods of maritime commerce, when the oar was the great agent of propulsion, vessels were entirely unlike those of modern times – and each nation and period has had its peculiar agents of commerce and navigation adapted to its own wants and its own waters, and the names and the descriptions of ships and vessels are without number.

Id. at 344-345, quoting E. Benedict, AMERICAN ADMIRALTY, § 241, pp.133-134 (1850).

As technology has expanded, so have the kinds of vessels and the purposes to which they are put. Judge Eugene Davis of the Fifth Circuit has described the efforts of maritime courts to classify the ever-changing kinds of craft utilized in the offshore and inland exploration for oil and gas:

> Admiralty judges face no greater challenge than that of adapting principles of general maritime law to the changing technology in structures claiming to be vessels in navigation, particularly in the context of determining whether a worker is a seaman. Early decisions struggled with maritime issues arising with dry docks, canal boats, wharf boats, and retired liberty ships. In addition, the search for oil and gas under inland and offshore waters has changed the face of

admiralty law. Admiralty judges have considered the status of jack-up drilling rigs, submersible drilling rigs, semisubmersible drilling rigs, drill ships, pipelaying barges, derrick barges, compressor stations, fixed platforms, tenders with widowmakers, spud barges, a quarterboat barge serving as a floating hotel, a submarine pipe alignment rig, and a spar, or 'a nautical structure designed to float with the bulk of the hull below the waves – something akin to a giant buoy.' In other contexts, admiralty judges have considered structures such as museum ships, caissons, floating construction platforms, a tractor trailer transporting a house across a frozen lake, floating casinos, crane barges, a submerged cleaning and maintenance platform used to clean the hulls of vessels, and a vessel mock-up that was used to film the movie TORA, TORA, TORA. Claims have even been made that helicopters should be considered vessels.

Hon. W. Eugene Davis, *The Role of Federal Courts in Admiralty: The Challenge Facing the Admiralty Judges of the Lower Federal Courts*, 75 Tul. L. Rev. 1355, 1375 (2001) (citations omitted).

New types of vessels continue, and will continue, to be developed and used in maritime work.[11] As the Court in *Robison* sagely noted, it has

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[11] *See e.g.*, *Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 353 (5th Cir. 1999) (describing the "Neptune Spar"); *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 n.1 (9th Cir. 1983) ("submerged cleaning and maintenance platform"); *Fox v. Taylor Diving and Salvage Co.*, 694 F.2d 1349, 1351 (5th Cir. 1983) ("submarine pipe alignment rig"); *McKay v. Offshore Speciality Fabricators, Inc.*, 1997 WL 289365 (E.D. La. 1997) ("tension leg wellhead platform"); *Gumpert v. Pittman Const., Inc.*, 736 So. 2d 1026, 1030 (La. App. 1999) ("self-propelled transportation platform").

been the absence of any narrow or restricted rule of law governing seaman status which has "enabled the law to develop naturally along with the development of unconventional vessels." *Robison*, 266 F.2d at 780. The proposed test is broad and inclusive enough to capture this wide variety of vessels, now and in the future.

VI. THE PROPOSED TEST FURTHERS THE UNDERLYING POLICY OF THE JONES ACT.

The "congressional purpose of the [Jones Act] is 'the benefit and protection of seamen who are peculiarly the wards of admiralty.'" *Cox v. Roth*, 348 U.S. 207, 209 (1955), quoting *The Arizona v. Anelich*, 298 U.S. 110 (1936). The Jones Act is thus "entitled to a liberal construction to accomplish its beneficent purposes." *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 790 (1949).

The proposed test is consistent with this policy underlying the Jones Act because it provides the protections of that law to those sea-based workers who, as a regular part of their employment, are exposed to marine perils, regardless of whether the vessels they serve are traditional or special-purpose vessels.

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the court of appeals, and to establish a vessel status test as proposed hereinabove.

Respectfully submitted,

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IN THE

Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

CORRECTED COPY

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF DIAMOND OFFSHORE DRILLING, INC., ENSCO INTERNATIONAL INCORPORATED, GLOBALSANTAFE CORPORATION, NOBLE CORPORATION, PRIDE INTERNATIONAL, INC., ROWAN COMPANIES, INC., TRANSOCEAN INC., AND TODCO AND THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS, AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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Diamond Offshore Drilling, Inc., ENSCO International Incorporated, GlobalSantaFe Corporation, Noble Corporation, Pride International, Inc., Rowan Companies, Inc., Transocean Inc. and TODCO and the International Association of Drilling Contractors, respectfully submit this brief as *amici curiae* in support of the Petitioner, Willard Stewart.

I. IDENTITY AND INTEREST OF AMICUS CURIAE IDENTITY OF AMICUS CURIAE[1]

Diamond Offshore Drilling, Inc., ENSCO International, Inc., GlobalSantaFe Corporation, Noble Corporation, Pride International, Inc., Rowan Companies, Inc., Transocean Inc., and TODCO (referred to jointly as "Drilling Contractors") and the International Association of Drilling Contractors ("IADC") join in filing this brief as *amici curiae*.

Diamond Offshore Drilling, Inc., ENSCO International, Inc., GlobalSantaFe Corporation, Noble Corporation, Pride International, Inc., Rowan Companies, Inc., Transocean Inc., and TODCO are all major deepwater offshore drilling contractors with headquarters or principal executive offices located in either Houston or Dallas. Each operates a large

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1. This amicus Brief was authored by James Patrick Cooney of Royston, Rayzor, Vickery & Williams, L.L.P. No person or entity other than Diamond Offshore Drilling, Inc., ENSCO International Incorporated, GlobalSantaFe Corporation, Noble Corporation, Pride International, Inc., Rowan Companies, Inc., Transocean Inc., and TODCO and the International Association of Drilling Contractors made a monetary contribution to the preparation or submission of the Brief. The above named amici curiae have received and filed concurrently with the filing of this Brief the written consents of the parties.

fleet of mobile offshore drilling rigs in waters off the United States and around the world. Taken collectively, the Drilling Contractors own or operate over 400 mobile offshore drilling units, which easily represents a majority of the units in operation world wide, and employ thousands of individuals to work aboard these units. Details with regard to their operations and the composition of their drilling fleets can be obtained off their respective web sites.[2] All of the Drilling Contractors are members of the IADC.

Since 1940, the IADC has exclusively represented the worldwide oil and gas drilling industry. Its mission is to promote commitment to safety, preservation of the environment, and advances in drilling technology.

From its Houston headquarters, the IADC strives to secure responsible standards, practices, and regulations that provide for safe, efficient, and environmentally sound drilling operations worldwide. The Association educates its members through programs and publications and develops industry training standards. Founded in 1940, the IADC has offices in Washington, D.C., the United Kingdom, the Netherlands, and the Middle East, and has chapters in the United Kingdom, Venezuela, Brazil, Australia, South Central Asia, Southeast Asia, the Middle East, North Africa, and throughout the United States.

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2. Diamond Offshore Drilling, Inc.-www.diamondoffshore.com; ENSCO International, Inc.-www.enscous.com; GlobalSantaFe Corporation-www.gsfdrill.com; Noble Corporation-www.noblecorp.com; Pride International, Inc.-www.prideinternational.com; Rowan Companies, Inc.-www.rowancompanies.com; Transocean, Inc.-www.deepwater.com; and TODCO-www.theoffshoredrillingcompany.com.

IADC membership includes contract drilling and well-servicing firms, oil and gas producers, and manufacturers and suppliers of oilfield equipment and services. The IADC's contract drilling members own most of the world's land and offshore drilling units and drill the vast majority of the world's oil, natural gas, and geothermal wells. The IADC is an independent trade association that has over 500 member companies, predominately drilling contractors. A full list of the IADC's members can be found on its website at http://iadc.org.

The IADC holds "Accredited Observer" status at the International Maritime Organization and the International Seabed Federation, both branches of the United Nations.

The IADC also drafts and publishes model drilling contract forms for use in the oil and gas industry.

The Drilling Contractors and the IADC file this *amicus* brief in support of Petitioner Willard Stewart's petition to reverse the judgment of the United States Court of Appeals for the First Circuit in this matter. This Court's ruling on the legal standard to be used to determine whether a special purpose watercraft, which includes mobile offshore and inshore drilling rigs, will directly affect the offshore drilling contractor members of the Association.

This brief is filed with the consent of the President of the IADC, Dr. Lee Hunt, who has the authority to file *amicus* briefs in appeals that affect or may affect the interests of the IADC, or its members.

II. SUMMARY OF THE ARGUMENT

Mobile offshore drilling units, whether jack-ups, semi-submersibles, drill ships, or simple inland drilling barges, are remarkably similar to the dredge barge which is the focus of the case currently before the Court. Mobile offshore drilling units have three characteristics: (1) they are capable of conducting drilling operations in a marine environment; (2) they are capable of floating and (3) they are mobile, in that they are capable of transporting drilling equipment from well site to well site over water. As a general proposition, mobile offshore drilling units have been held to be Jones Act vessels. However, if a standard comparable to that followed in the First Circuit is adopted, they may no longer qualify as Jones Act vessels, particularly when they are engaged in drilling activities.

Mobile offshore drilling units have been considered Jones Act vessels since the 1959 Fifth Circuit decision in *Offshore Company v. Robison*, 226 F.2d 769 (CA5 1959). This position has been reaffirmed by *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344, 1998 AMC 1390 (CA5 1998). As this Court has found it useful to rely on *Robison* in approaching questions of Jones Act status, it may find it useful to rely on similar Fifth Circuit cases addressing the issue of what constitutes a vessel for Jones Act purposes. The focus of the Fifth Circuit cases determining whether a special purpose watercraft is a Jones Act vessel has been the mobility of the watercraft.

The consistent treatment of mobile offshore drilling units as Jones Act vessels has provided a degree of stability and predictability which has allowed for the development of an effective system of risk allocation and claims management.

The adoption of the First Circuit approach would adversely affect this stability and predictability and render the current system of risk allocation and claims management less effective, without bringing with it any discernable benefits.

The conflict among the Circuits as to the standard by which to determine if a special purpose watercraft is a Jones Act vessel should be resolved by fashioning a standard consistent with the definition of a vessel found in 1 U.S.C. § 3 and the developed case law of the Fifth Circuit.

III. ARGUMENT

A. Mobile Offshore Drilling Rigs are Vessels.

The various types of watercraft employed by the offshore drilling industry to conduct drilling operations in the maritime environment (referred to hereafter generically as "mobile offshore drilling units"[3]) are remarkably similar in many respects to the dredge barge involved in the instant case. Mobile offshore drilling units are dual purpose floating structures designed to both transport drilling equipment from one site to another over water and then to serve as a stationary platform from which a drilling operation can be conducted. There are several types of mobile offshore drilling units. Jack-ups are self elevating barges equipped with retractable legs that can be lowered to the ocean floor so that the barge on which the legs are mounted can be "jacked up" on its legs above the level of the water to conduct drilling operations. A jack-up generally is not self propelled and is towed from

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3. *See* 46 CFR Subchapter 1-A, which refers to vessels capable of engaging in drilling operations for the exploration and exploitation of subsea resources as "mobile offshore drilling units."

site to site to conduct drilling operations. A semi-submersible is a barge that may or may not be self-propelled which has pontoons or buoyancy chambers located on short columns below the drilling platform which can be partially submerged to provide stability. They are either anchored in place or maintain their position over the well with dynamically positioning thruster engines. A drill ship is a ship-shaped displacement hull upon which a drilling rig is mounted. It is self propelled and maintains position over a site during drilling operations by use of either anchors or dynamically positioning thrusting engines. In addition to jack-ups, semi-submersibles and drill ships, there are various types of barge mounted drilling rigs used in inland waters, which may be totally submersible, so that the barge rests on the bottom during operations. Alternatively, the barge may be equipped with legs or spuds to insure a stationary position during operations. There are also tender vessels that can be used to support operations conducted from fixed platforms. All such units are documented as vessels and are subject to Coast Guard regulation. 46 CFR Subchapter 1-A. Regardless of the configuration, all mobile offshore drilling units have three characteristics: *first*, they are capable of conducting drilling operations in a marine environment; *second*, they are capable of floating and, *third*, they are mobile, in that they are capable of transporting drilling equipment from well site to well site over water.[4]

As a general proposition, mobile offshore drilling units have been held to be Jones Act vessels so that the maritime workers permanently assigned to them have been afforded

4. Attached as Appendix II are diagrams showing the configuration of a jack up, a semi-submersible and a drill ship

Jones Act seaman status.[5] However, if a standard comparable to that followed by the court below is adopted, it appears that these workers will no longer qualify for Jones Act status, at least for the time the unit to which they are assigned is engaged in drilling operations. The purpose of this *amicus* brief is to call to the attention of the Court the interest of the drilling contractors and the IADC in the outcome of this case and to urge the Court to leave undisturbed the current practice of treating mobile offshore drilling units as Jones Act vessels when they are in transit and when they are engaged in drilling operations.

B. Mobile Offshore Drilling Units Have Consistently Been Considered Vessels for the Purpose of the Jones Act.

At least since 1959, the Fifth Circuit in *Offshore Company v. Robison*, 226 F.2d 769 (CA5 1959), mobile offshore drilling units have been considered "vessels" for the purposes of the Jones Act. The classification of mobile offshore drilling units as Jones Act vessels has recently been reaffirmed by the Fifth Circuit in *Manuel v. P.A.W. Drilling & Well Service, Inc.*; 135 F.3d 344, 1998 AMC 1390 (CA5 1998). Thus, at least within the Fifth Circuit, so long as a workman injured on an offshore drilling unit can show he was assigned permanently to the unit or performed a substantial part of his work on the unit and the duties which he performed contributed to the function of the unit or to the accomplishment of its mission, he can obtain a remedy under the Jones Act and the General Maritime Law.

5. *See generally*, "When is Vessel in Navigation for Purposes of Jones Act," 5 A.L.R. Fed. 674

The approach taken by the Fifth Circuit in *Robison*, a case dealing with a member of a drilling crew injured on a mobile drilling platform, has been relied upon by this Court in its recent decisions clarifying the requirements for Jones Act seaman status. In *McDermott International v. Wilander*, 498 U.S. 337 (1990), this Court addressed the type of *activity* a seaman must perform to qualify as a Jones Act seaman and essentially followed the *Robison* formulation in observing that "the requirement that an employee's duties must 'contribute to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status," and that "[I]t is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Id.* 335. In *Chandris v. Latsis*, 515 U.S. 357 (1995), the Court dealt with the "relationship a worker must have to a vessel, regardless of the specific tasks the worker undertakes, in order to obtain seaman status," in holding

> that the 'employment-related connection to a vessel in navigation' necessary to qualify as a seaman under the Jones Act . . . comprises two basic elements: the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature.

Id. 376.

In similar fashion, this Court may find it useful to rely on cases such as *Manuel v. P.A.W. Drilling & Well Service, Inc., supra*; *Fields v. Pool Offshore*, 182 F.3d 353 (CA5 1999), and *Colomb v. Texaco*, 736 F.2d 218 (CA5 1984), in formulating a standard to determine whether a special purpose watercraft is a Jones Act "vessel" that is also consistent with the definition of a vessel contained in 1 U.S.C. § 3.

In *Manuel*, the Fifth Circuit began by "examining the purpose for which the craft is constructed and the business in which it is engaged" (citing *The Robert W. Parsons*, 191 U.S. 17, 30 (1930)). As the Court observed, "in applying this test, two divergent lines of cases have emerged. In one line of cases, we have concluded that special purpose structures such as jack-up rigs, mobile, submersible drilling barges, derrick barges, spud barges and others are vessels as a matter of law, even though they also served, in part as work platforms." *Id.* 347. As the Court explained, the purpose for which such craft were constructed was to transport drilling or similar equipment from place to place across navigable water to drill or service wells located in navigable waters. *Id.* 351.

In *Colomb*, the Fifth Circuit focused on the mobility of an inland, submersible, spud drilling barge to hold that it was a Jones Act vessel as a matter of law.

> The Barge ERIS was constructed for the purpose of going to various drilling locations to drill or work over oil and gas wells. It was engaged in that business at the time of the accident. According to the undisputed testimony, the Barge ERIS was highly mobile, it was routinely floated to a

particular location and submerged; it remained submerged and in a fixed location for short periods while it completed a drilling or workover job. It was then refloated and towed to the next job site. *Id.* 221.

In *Fields v. Pool Offshore Company*, 183 F.3d 353 (CA5 1999), the Fifth Circuit held that a spar anchored above a field of seven well heads by chain wire lines connected to pilings driven into the sea bed and fixed in place by a network of pipe running to the well heads was not a vessel as a matter of law. The court began its analysis with the definition of a vessel as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water" found at 1 U.S.C. § 3 and then focused on the spar's lack of mobility in holding that it could not qualify as a Jones Act vessel.

C. The Consistent Treatment of Mobile Offshore Drilling Units as Jones Act Vessels has Provided a High Degree of Stability and Predictability.

The question of whether a mobile offshore drilling unit is a Jones Act vessel has been largely settled in the Fifth Circuit and this has brought about a significant level of stability and predictability to the handling of personal injury claims brought by employees serving aboard mobile offshore drilling units. The value of this stability and predictability should not be lightly disregarded. The more or less consistent approach to Jones Act status which has developed over the last 34 years since the *Robison* decision has allowed a well ordered personal injury compensation system to evolve in the offshore drilling industry generally. In Texas, Louisiana and Mississippi (all within the Fifth Circuit), where most

offshore drilling operations in American waters take place, there is little or no confusion as to who is a Jones Act seaman and who is not. This has allowed for the development of a reasonably effective system of risk allocation and claims management, which includes the placement of appropriate insurance coverages by drilling contractors and other offshore employers and the contractual allocation of responsibility and risk among the employers, depending on the legal status of workers they employ.

Central to the effectiveness of this system is the high degree of predictability of employee status. Assuming the criteria set out in *Chandris* are met, a rig worker is a Jones Act seaman regardless of whether the mobile offshore drilling unit is in transit or stationary, engaged in drilling operations at a site, or is somewhere in between. Likewise, workers whose attachment to the drilling unit is more transitory or attenuated, such as wireline and casing crew workers, generally are covered under the Longshore Act. Others, whose work is on fixed platforms may find themselves covered either by the Longshore Act or by state workers' compensation, depending on the maritime nature of their work. This ability to predict the status of an offshore worker has benefitted the offshore worker by providing certainty as to his or her rights to recover damages for injury and it has assisted employers in the development of comprehensive indemnity and insurance allocation schemes, whereby each employer, to the extent possible, assumes responsibility to provide appropriate compensation to its own employees regardless of which employer may have been legally responsible for the injury.[6] To the extent the predictability of

6. An example of such a contractual indemnity/insurance arrangement can be found in the Liability and Insurance Articles of (Cont'd)

legal status of an offshore oil worker is reduced, the effectiveness of the existing approach to employee injury compensation is diminished. Such an outcome is undesirable.

D. The Adoption of the First Circuit Approach Would Adversely Affect this Stability and Predictability.

While the general approach of the Fifth Circuit is not without its flaws, it seems preferable to the consequences that appear likely to follow as a result of the application to the offshore oil industry of the more restrictive standard for Jones Act vessel status exemplified by the First Circuit's decision in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (CA1) (en banc), *cert denied*, 506 U.S. 827 (1992), and the case now before the Court. It appears that under the First Circuit approach, a mobile offshore drilling unit would be classified as a non-vessel work platform for Jones Act purposes while it was engaged in drilling operations, but that it would be considered a Jones Act vessel when in transit from one drilling site to another. As a result, the crew assigned to such a unit would move in and out of Jones Act and Longshore Act status depending on the activity of the vessel. Inevitably, questions would arise as whether a crew injury sustained while the unit was in transition between its drilling function and its transportation function should be treated as a claim under the Jones Act or the Longshore and Harbor Workers Compensation Act. Such a state of affairs would unduly complicate the management of personal injury claims by the Drilling Contractors and similarly situated members

(Cont'd)
the IADC Offshore Daywork Drilling Contract – US (Revised April 2003), a copy of which is attached at Appendix I. As used in the Contract, the "Operator" is the owner of the well and the "Contractor" is the drilling contractor.

of the IADC. Insurance coverage for claims arising out of the Longshore Act is generally provided by carriers other than those who provide Jones Act coverage. Claims brought under the Longshore Act are administered by an administrative agency of the Federal government, while the Jones Act is administered through the courts. As a result, the compensation available to injured offshore workers and the process for obtaining those benefits would differ depending on the activity of the mobile offshore drilling unit at the time of injury.

Inherent in the First Circuit approach is the possibility that while a mobile offshore drilling unit may not be a vessel for the purposes of the Jones Act while engaged in drilling operations, it would remain a vessel for the purposes of Section 905(b) of the Longshore Act. Thus, to the extent that an offshore worker is injured while the vessel is engaged in drilling operations, there would be possible exposure to tort liability under Section 905(b) of the Longshore Act in addition to the statutory obligation to pay LHWCA compensation benefits. While the responsibility of a vessel owner is fairly well developed by the cases in the stevedoring context, there is no comparable body of case law applicable to the offshore oil industry generally and a new period of uncertain development would have to be faced.

The notion that a special purpose watercraft can be classified as a vessel for one purpose and not for another is perhaps one of the most troublesome aspects of the restrictive approach of the First Circuit and the Circuits that follow its lead. To say that a special purpose watercraft can be a vessel for the purpose of not only the Longshore Act, but the Limitation of Liability Act and for regulation by the Coast Guard[7], and yet not be a vessel for the purposes of the Jones Act because the unit is stationary is neither logical or consistent.

7. *See* 46 CFR Subchapter 1-A

Finally, the adoption of the restrictive approach of the First Circuit would require the reevaluation of the contractual indemnity and risk allocation schemes that are in general use in the oil industry. In general, the offshore oil industry would undoubtedly experience a period of uncertainty while the new rules of the game could be worked out.

E. Any Standard for Determining Whether a Special Purpose Watercraft is a Jones Act Vessel Must Provide Stability and Predictability in the Offshore Drilling Context.

There is an old maxim frequently heard in the oil patch that seems particularly applicable to the present situation: "If it ain't broke, don't fix it." For virtually the last thirty-five years, a body of law has been developing, principally in the Fifth Circuit, that applies the Jones Act and the general maritime law to the special issues raised in the offshore oil industry. While that body of law is by nature incomplete and imperfect, it has proven to be workable and predictable. Moreover, it is accepted by both employers and employees alike as a framework within which to go about the task of providing compensation for offshore workers injured as a result of their work on mobile offshore drilling units. A redefinition of the standard for a Jones Act vessel will only introduce new problems, many of which cannot be foreseen today, without, at the same time, offering any significant improvement over the status quo.

While the offshore drilling contractors may find the present state of the law in the Fifth Circuit to be acceptable, it must be acknowledged that there is substantial conflict between the law as it stands in the Fifth Circuit and the law of several of the other Circuits. Clearly, a national standard

applicable to all types of special purpose watercraft must be adopted. We join with the Petitioner in suggesting that the Court focus initially on Section 3 of Title 1, U.S.C. which defines a vessel as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water" and a definition of a Jones Act seaman found by implication in Section 2 of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 902, as "a master or member of the crew of any vessel . . ." Relying on these statutory provisions and the analysis provided by cases such as *Robison* and *Manuel* from the Fifth Circuit, this Court should then fashion a uniform standard consistent with its earlier decisions in *Wilander* and *Chandris* for the determination of whether a special purpose watercraft is a vessel, not just for the purposes of the Jones Act, but for all purposes. Any suggestion that the legal status of such a watercraft can alternate between being a vessel and not being a vessel depending on its activity or use at a particular time should be rejected, so that a vessel would remain a vessel so long as it is engaged in one of its many intended functions.

IV. CONCLUSION

The Drilling Contractors and the IADC on behalf of all its offshore drilling contractor members, urge that the Court fashion a standard for the determination of whether a special purpose watercraft is a Jones Act vessel that leaves essentially unchanged the present status of mobile offshore drilling units as Jones Act vessels.

Respectfully submitted,

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APPENDIX I — LIABILITY AND INSURANCE ARTICLES OF THE IADC OFFSHORE DAYWORK DRILLING CONTRACT – US (REVISED APRIL 2003)

ARTICLE IX - LIABILITY

900. *General*

For the purposes of this Article IX, the terms "Affiliated Company", "Contractor's Items", Operator's Items", "Contractor's Personnel" and "Operator's Personnel" shall have the meanings as defined in Article I.

901. *Equipment or Property*

(a) Except as specifically provided herein to the contrary, Contractor shall at all times be responsible for and hold harmless and indemnify Operator from and against damage to or loss of Contractor's property, Contractor's Items, and the property, equipment, material and services of Contractor's Affiliated Companies, partnerships, and limited liability companies, and its and all of their co-owners; partners, co-venturers, joint owners, and its contractors and subcontractors of any tier and the officers, directors, employees, agents, assigns, representatives, managers, consultants, insurers and subrogees of each of the foregoing. Except to the extent that the proceeds from Contractor's insurance as made available to Contractor do not compensate Contractor therefor,

(1) Operator shall be responsible for and hold harmless and indemnify Contractor for loss or destruction of or damage to Contractor's drill pipe, drill collars, subs, reamers, bumper subs, stabilizers and other in-hole

Appendix I

equipment when such equipment is being used in the hole below the rotary table, normal wear excepted. Abnormal wear and/or damage for which Operator shall be responsible hereunder shall include, but not be limited to, wear and/or damage resulting from the presence ofH_2S or other corrosive elements in the hole including those introduced into the drilling fluid, excessive wear caused by sandcutting, damage resulting from excessive or uncontrolled pressures such as those encountered during testing, blowout, or in a well out of control, excessive deviation of the hole from vertical, dog-leg severity, fishing, cementing or testing operations, and from any unusual drilling practices employed at Operator's request. Operator's responsibility for such abnormal wear and/or damage as referred to herein shall include abnormal wear and/or damage to Contractor's choke hoses and manifolds, BOP and other appurtenant equipment. Operator shall pay the cost of repairing damaged equipment if repairable. In the case of equipment lost, destroyed or damaged beyond repair, Operator shall reimburse Contractor an amount equal to the then current replacement cost of such equipment delivered to the Drilling Unit.

(2) Operator shall be responsible for and hold harmless and indemnify Contractor for damage to or loss of Contractor's subsea and mooring equipment, including without limitation, chains, anchors, the riser, slip joint, choke and kill lines, flexible hoses, hydraulic hoses and guidelines, subsea BOP, shackles, pendant lines and buoys, and shall reimburse Contractor an amount equal to the then current replacement cost of such equipment delivered to the Drilling Unit, or the repair cost, whichever is applicable.

Appendix I

(3) Operator shall be responsible for and hold harmless and indemnify Contractor for loss or destruction of or damage, including corrosion and contamination, to Contractor's surface equipment resulting from the presence ofH_2S, $C0_2$ or other corrosive elements introduced into the drilling fluid (including elements introduced from the hole), or the presence of naturally occurring radioactive materials (NORM). Operator shall pay the cost of repairing andlor decontaminating damaged equipment if repairable. In the case of equipment lost, destroyed, damaged or contaminated beyond repair, Operator shall reimburse Contractor an amount equal to the then current replacement cost of such equipment delivered to the Drilling Unit. In addition, notwithstanding the provisions of Paragraph 706 of this Contract, the Standby Rate shall apply with respect to any downtime that may occur or result from such damage, including decontamination operations.

(4) Operator shall be responsible for and hold harmless and indemnify Contractor for damage to or loss of the Drilling Unit caused by Operator furnished helicopter, tugs, supply or service vessels.

(b) Contractor's operating practices require the BOP stack to be operated atone (1) degree or less from vertical to avoid abnormal wear and damage. In the event the stack angle exceeds one (1) degree from vertical, Operator shall be responsible for and hold harmless and indemnify Contractor for loss or damage to Contractor's subsea and in-hole equipment which may result. Operator shall pay the cost of repairing damaged equipment if repairable In the case of equipment lost, destroyed or damaged beyond repair,

Appendix 1

Operator shall reimburse Contractor an amount equal to the then current replacement cost of such equipment delivered to the Drilling Unit. In addition, notwithstanding the provisions of Paragraph 706 of this Contract, the Standby Rate shall apply with respect to the period of time required to repair or replace Contractor's subsea and in-hole equipment that may occur or result from such loss or damage.

(c) Operator shall at all times be responsible for and hold harmless and indemnify Contractor from and against damage to or loss of Operator's property, Operator's Items, and the property, equipment, material and services of Operator's Affiliated Companies, partnerships, and limited liability companies, and its and all of their co-owners, co-lessees, farmors, farmees, partners, co-venturers, joint owners, and its contractors and subcontractors of any tier (with the exception of Contractor and its subcontractors of any tier) and the officers, directors, employees, agents, assigns, representatives, managers, consultants, insurers and subrogees of each of the foregoing.

902. ***The Hole***

In the event the hole should be lost or damaged at any time, Operator shall, except as provided in Paragraph 705(f), be responsible for and hold harmless and indemnify Contractor and its suppliers, contractors and subcontractors of any tier from such damage to or loss of the hole, including all downhole property therein.

Appendix 1

903. ***Contractor's Personnel***

Contractor shall at all times be responsible for and hold harmless and indemnify Operator from and against all claims, demands and causes of action of every kind and character on account of bodily injury, illness or death of Contractor's Personnel or Contractor's invitees or damage to their property.

904. ***Operator's Personnel***

Operator shall at all times be responsible for and hold harmless and indemnify Contractor from and against all claims, demands, and causes of action of every kind and character on account of bodily injury, illness or death of Operator's Personnel or Operator's invitees or damage to their property.

905. ***Pollution and Contamination***

Notwithstanding anything to the contrary contained herein, the responsibility for pollution or contamination shall at all times be as follows:

(a) Contractor shall be responsible for and hold harmless and indemnify Operator for control and removal of pollution or contamination which originates above the surface of the water from spills of fuels, lubricants, motor oils, normal water base drilling fluid and attendant cuttings, pipe dope, paints, solvents, ballast, bilge and garbage wholly in Contractor's possession and control and directly associated with Contractor's equipment and facilities. For purposes hereof

the term "normal water base drilling fluid" means drilling fluid which does not exceed toxicity limits specified for offshore discharges by the environmental protection entity having jurisdiction over the Operating Area.

(b) Operator shall be responsible for and hold harmless and indemnify Contractor and its suppliers, contractors and subcontractors of any tier against all claims, demands, and causes of action of every kind and character (including control and removal of the pollutant involved) arising directly or indirectly from all pollution or contamination (including radioactive contamination), other than that described in Paragraph 905(a) above, which may occur including, but not limited to, that which may result from fire, blowout, cratering, seepage or any other uncontrolled flow of oil, gas, water or other substance, as well as the use of or disposition of radioactive sources, lost circulation and fish recovery materials and fluids, oil emulsion, oil base or chemically treated drilling fluids and attendant cuttings, and drilling fluids other than "normal water base drilling fluid" defined in Paragraph 905(a) above.

(c) In the event a third party commits an act or omission which results in pollution or contamination for which either Contractor or Operator for whom such party is performing work is held to be legally liable, the responsibility therefor shall be considered, as between Contractor and Operator, to be the same as if the party for whom the work was performed had performed the same and all of the obligations and limitations set forth in Paragraphs 905(a) and (b) above, shall be specifically applied.

906. *Debris Removal and Cost of Control*

Operator shall at all times be responsible for and hold harmless and indemnify Contractor for the cost of removal of debris (including Contractor's Items) to the extent that proceeds from Contractor's insurance as made available to Contractor do not compensate Contractor therefor. Operator shall at all times be responsible for and hold harmless and indemnify Contractor for the cost of regaining control of any wild well.

907. *Underground Damage*

Operator shall at all times be responsible for and hold harmless and indemnify Contractor and its suppliers, contractors and subcontractors of any tier from and against any and all claims on account of injury to, destruction of, or loss or impairment of any property right in or to oil, gas or other mineral substance or water, if at the time of the act or omission causing such injury, destruction, loss, or impairment, said substance had not been reduced to physical possession above the seabed, and for any loss or damage to any formation, strata, or reservoir beneath the seabed.

908. *Patent Liability*

Contractor shall at all times be responsible for and hold harmless and indemnify Operator from and against any and all loss or liability arising from infringement of patents of the United States covering equipment furnished by Contractor. Operator shall at all times be responsible for and hold harmless and indemnify Contractor from and against

any and all loss or liability arising from infringement or alleged infringements of patents covering the property, equipment, methods or processes furnished or directed by Operator.

909. *Consequential Damages*

Subject to and without affecting the provisions of this Contract regarding the payment rights and obligations of the parties or the risk of loss, release and indemnity rights and obligations of the parties, each party shall at all times be responsible for and hold harmless and indemnify the other party from and against its own special, indirect or consequential damages, and the parties agree that special, indirect or consequential damages shall be deemed to include, without limitation, the following: loss of profit or revenue; costs and expenses resulting form business interruptions, loss of or delay in production; loss of or damage to the leasehold; loss of or delay in drilling or operating rights; cost of or loss of use of property, equipment, materials and services, including without limitation those provided by contractors or subcontractors of every tier or by third parties.

Operator shall at all times be responsible for and hold harmless and indemnify Contractor from and against all claims, demands and causes of action of every kind and character in connection with such special, indirect or consequential damages suffered by Operator's co-owners, co-venturers, co-lessees, farmors, farmees, partners and joint owners.

910. *Termination of Location Liability*

Notwithstanding any other provisions of this Contract, once the Drilling Unit is under way from the well location, Operator shall be responsible for and hold harmless and indemnify Contractor for loss or damage to property, personal injury or death of any person which occurs thereafter as a result of the condition of the well or the location and Contractor shall be relieved of such liability.

911. *Indemnity Obligation*

(a) The parties intend and agree that the phrase "be responsible for and hold harmless and indemnify" in Paragraphs 605, 606, 805 and 901 through 910 hereof means that the indemnifying party shall release, indemnify, hold harmless and defend (including payment of reasonable attorney's fees and costs of litigation) the indemnified party from and against any and all claims, demands, causes of action, damages, judgments and awards of any kind or character, without limit and without regard to the cause or causes thereof, including claims, demands, and causes of action arising out of operation of any vessel or vessels (including the Drilling Unit), including ingress and egress to the well location, and loading and unloading of personnel and cargo, and also including preexisting conditions, defect or ruin of premises or equipment (whether such conditions, defect or ruin be patent or latent), the unseaworthiness of any vessel or vessels (including the Drilling Unit), breach of representation or warranty (express or implied), breach of duty (whether statutory, contractual or otherwise), strict liability, any theory of tort, breach of contract, fault,

regulatory or statutory liability, products liability, the negligence of any degree or character (whether such negligence be sole, joint or concurrent, active, passive or gross) of any person or persons, including such negligence of the party seeking the benefit of a release, indemnity or assumption of liability, or any other theory of legal liability.

(b) An indemnifying party's obligations contained in this Contract shall extend to the indemnified party and shall inure to the benefit of such party, its Affiliated Companies, and their co-owners, co-venturers, co-lessees, farmors, farmees, and joint owners, and the officers, directors, stockholders, partners, managers, representatives, employees, consultants, agents, servants and insurers of each, and to actions against the Drilling Unit, its legal and beneficial owners, whether in rem or in personam.

(c) Except as otherwise provided herein, the terms and provisions of Paragraphs 605, 606, 805 and 901 through 910 shall have no application to claims or causes of action asserted against Operator or Contractor which arise solely by reason of any agreement of indemnity with a person or entity not a party hereto. Except as otherwise provided herein, nothing contained herein shall confer any rights upon any third party beneficiary.

912. *General Intent.*

The parties recognize that the performance of well drilling, workover and associated activities such as those to be performed under this Contract have resulted in bodily injury, death, damage or loss of property, well loss or damage,

pollution, loss of well control, reservoir damage and other losses and liabilities. It is the intention of the parties hereto that the provisions of this Article IX and Paragraphs 605, 606 and 805 shall exclusively govern the allocation of risks and liabilities of said parties without regard to cause (as more particularly specified in Paragraph 911), it being acknowledged that the compensation payable to Contractor as specified herein has been based upon the express understanding that risks and liabilities shall be determined in accordance with the provisions of this Contract.

ARTICLE X - INSURANCE

1001. *Insurance*

Contractor shall carry and maintain, or cause to be carried and maintained, insurance coverages of the type and in the amounts set forth in Appendix E, covering only those liabilities specifically assumed by Contractor under this Contract.

All references in this Contract to "insurance" of Contractor shall mean such insurance as set forth in Appendix E. Contractor shall have the right to self-insure any or all of that portion of insurance relating to loss or damage to Contractor's Items.

Operator shall carry and maintain, or cause to be carried and maintained, the insurance coverages of the types and amounts set forth in Appendix F, covering only those liabilities specifically assumed by Operator under this Contract.

Appendix I

All references in this Contract to "insurance" of Operator shall mean such insurance as set forth in Appendix F. Operator shall have the right to self-insure any or all of that portion of insurance relating to loss or damage to Operator's Items.

1002. *Certificates*

Each party will furnish the other, on request, certificates indicating that the required insurance is in full force and effect and that the same shall not be canceled or materially and adversely changed without ten (10) days prior written notice to the other party.

1003. *Subrogation*

For liabilities assumed hereunder by Contractor, its insurance shall be endorsed to provide that the underwriters waive their right of subrogation against Operator, its Affiliated Companies and their co-owners, co-venturers, co-lessees, farmors, farmees, and joint owners and the officers, directors, stockholders, partners, managers, representatives, employees, consultants, agents, servants and insurers of each. Operator will, as well, cause its insurer to waive subrogation against Contractor and Contractor's Affiliated Companies and their co-owners, and the officers, directors, stockholders, partners, managers, representatives, employees, consultants, agents, servants and insurers of each for liabilities it assumes.

Appendix I

1004. *Additional Insured*

Contractor shall name Operator as additional insured, where permitted, under its policies of insurance, but only with respect to and to the extent of the liabilities specifically assumed by Contractor under this Contract. Operator shall name Contractor as additional insured, where permitted, under its policies of insurance, but only with respect to and to the extent of the liabilities specifically assumed by Operator under this Contract.

Appendix I

APPENDIX E

CONTRACTOR'S INSURANCE

I. *Workers' Compensation and Employer's Liability*

A. Workers' Compensation insurance to comply fully with the provisions and applicable laws of the country or state in which the Contractor qualifies as an employer and in which operations hereunder are performed, including U.S. Longshore & Harbor Workers Act and Outer Continental Shelf Lands Act coverage, if applicable.

B. Employer's Liability with limits of:

Bodily Injury by Accident	-	$1,000,000 each accident
Bodily Injury by Disease	-	$1,000,000 policy limit
Bodily Injury by Disease	-	$1,000, 000 each employee

C. Maritime Employer's Liability including Jones Act and Death on the High Seas Act coverage and transportation, wages, maintenance and cure with limits of $1,000,000 each person/$1,000,000 each accident.

D. "In rem" endorsement.

E. Borrowed Servant/Alternate Employer endorsement.

Appendix I

II. *Comprehensive General Liability Insurance*

A. Commercial General Liability, Protective Liability including coverage for premises/operations, contractor's protective liability, contractual liability and products/ completed operations coverage and subject to a $1,000,000 combined single limit of liability each occurrence for Bodily Injury and Property Damage.

B. Charterer's Legal Liability.

C. Deletion of watercraft exclusion as respects operations and contractual liability for watercraft exposure not covered by Protection and Indemnity policy.

D. "In Rem" endorsement.

III. *Automobile Liability Insurance*

Standard comprehensive form including all owned, hired and non-owned vehicles with a $1,000,000 combined single limit of liability each accident for bodily injury and/or property damage.

IV. *Aircraft Liability*

Aircraft liability including contractual liability covering all owned (if any) hired and non-owned aircraft (fixed wing and rotary) including passenger liability with a $5,000,000 combined single limit of liability each accident for bodily injury and/or property damage.

Appendix I

V. *Excess/Umbrella Liability Insurance*

1. Providing following form coverage for Employer's Liability, Maritime Employer's Liability Commercial General Liability, Automobile Liability, Aircraft Liability, and Vessel Liabilities.

2. Limit of Liability: $_____ combined single limit of liability each occurrence for bodily injury and/or property damage.

VI. *Marine Insurance*

1. Hull and Machinery Insurance (including collision liability) shall be provided for the Drilling Unit owned or chartered by Contractor and utilized in the performance of this Contract in an amount equal to the declared value of the Drilling Unit, subject to a deductible determined by Contractor.

2. Protection and Indemnity Insurance or equivalent comprehensive general liability insurance, with watercraft exclusion deleted, shall be provided with a combined single limit of U.S. $_____ per occurrence or the value of the Drilling Unit, whichever is greater.

Appendix I

VII. *No Recourse of Premium*

All policies of insurance shall be endorsed to delete any recourse of premium, club calls, assessments or advances against Operator, Operator's Affiliated Companies, partnerships, and limited liability companies, and its and all of their co-owners, partners, co-venturers, and joint owners.

VIII. *Deductibles*

Except as otherwise provided deductibles shall be for the account of Contractor.

Appendix I

APPENDIX F

OPERATOR'S INSURANCE

I. *Workers' Compensation/Employer's Liability*

A. Workers' Compensation insurance to comply fully with the provisions and applicable laws of the country or state in which the Operator qualifies as an employer and in which operations hereunder are performed, including U.S. Longshore & Harbor Workers Act and Outer Continental Shelf Lands Act coverage, if applicable

B. Employer's Liability with limits of:

Bodily Injury by Accident	-	$1,000,000 each accident
Bodily Injury by Disease	-	$1,000,000 policy limit
Bodily Injury by Disease	-	$1,000, 000 each employee

C. Maritime Employer's Liability including Jones Act and Death on the High Seas Act coverage and transportation, wages, maintenance and cure with limits of $1,000,000 each person/$1,000,000 each accident.

D. "In rem" endorsement.

E. Borrowed Service/Alternate Employer endorsement.

Appendix I

II. *Commercial General Liability Insurance*

A. Commercial General Liability including coverage for premises/operations, contractor's protective liability, contractual liability and products/completed operations coverage and subject to a $1,000,000 combined single limit of liability each occurrence for Bodily Injury and Property Damage.

B. Underground Resource/Equipment Coverage.

C. Charterer's Legal Liability.

D. Deletion of watercraft exclusion as respects operations and contractual liability for watercraft exposure not covered by Protection and Indemnity policy.

E. "In Rem" endorsement.

III. *Automobile Liability Insurance*

Standard comprehensive form including all owned, hired and non-owned vehicles with a $1,000,000 combined single limit of liability each accident for bodily injury and/or property damage.

IV. *Aircraft Liability*

Aircraft liability including contractual liability covering all owned (if any) hired and non-owned aircraft (fixed wing and rotary) including passenger liability with a $5,000,000 combined single limit of liability each accident for bodily injury and/or property damage.

Appendix I

V. *Excess/Umbrella Liability Insurance*

1. Providing following form coverage for Employer's Liability, Maritime Employer's Liability Commercial General Liability, Automobile Liability, Aircraft Liability, and Vessel Liabilities.

2. Limit of Liability: $_____ combined single limit of liability each occurrence for bodily injury and/or property damage.

VI. *"All Risk" Insurance*

"All Risk" Insurance, subject to a nominal deductible, covering physical loss or damage (including wreck/debris removal) to all Operator's Items and other property of Operator.

VII. *Operator's Extra Expense Insurance*

Operator's Extra Expense Insurance in the amount of not less than U.S. $_____ combined single limit per occurrence to cover any and all sums which Operator and/or Contractor may be obligated to incur as expenses and/or liabilities which may be incurred on account of bringing under control an oil or gas well which is out of control or extinguishing an oil or gas well fire, redrilling or repair of loss or damage to an oil or gas well, seepage and pollution, cleanup and contamination arising from operations under this Contract.

Appendix I

VIII. *No Recourse of Premium*

All policies of insurance shall be endorsed to delete any recourse of premium, club calls, assessments or advances against any member of Contractor, and its Affiliated Companies, partnerships and limited liability companies.

IX. *Deductibles*

Except as otherwise provided deductibles shall be for the account of Operator.

X. *Operator's Certificate of Financial Responsibility*

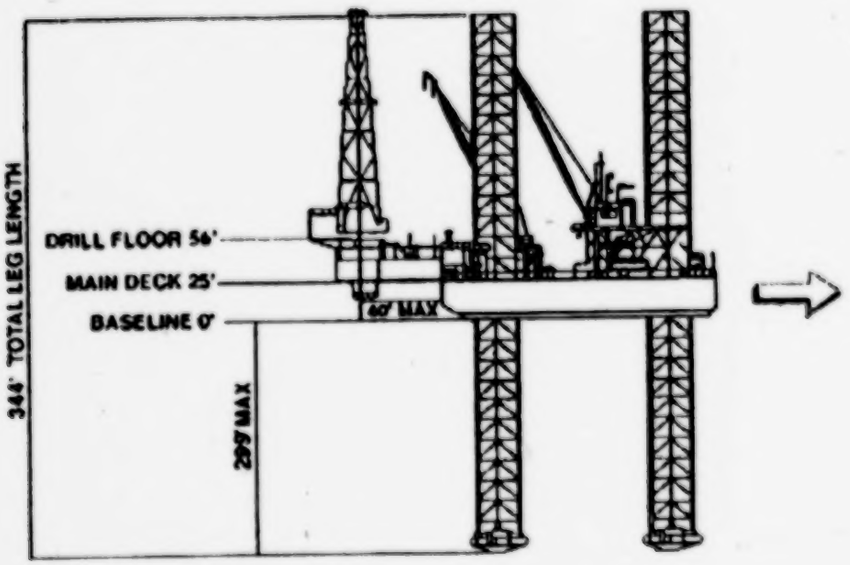
Operator shall provide a Certificate of Financial Responsibility in compliance with the Oil Pollution Act of 1990, as applicable, for operations in U.S. waters and shall provide a copy to Contractor.

XI. *Scope*

The above specified amounts and types of insurance coverage shall not be deemed to constitute, or be construed as, a limitation on Operator's liability under the Contract.

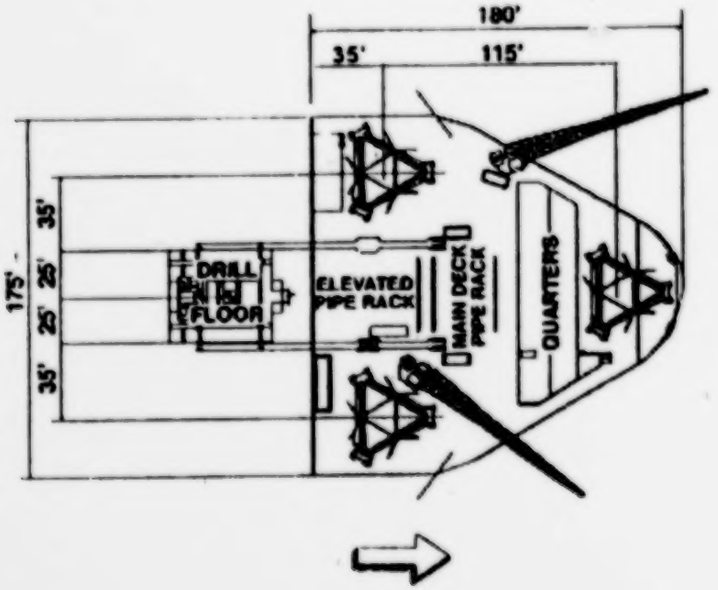
APPENDIX II — DIAGRAMS SHOWING CONFIGURATION OF A JACK UP, A SEMI-SUBMERSIBLE AND A DRILL SHIP

JACK UP



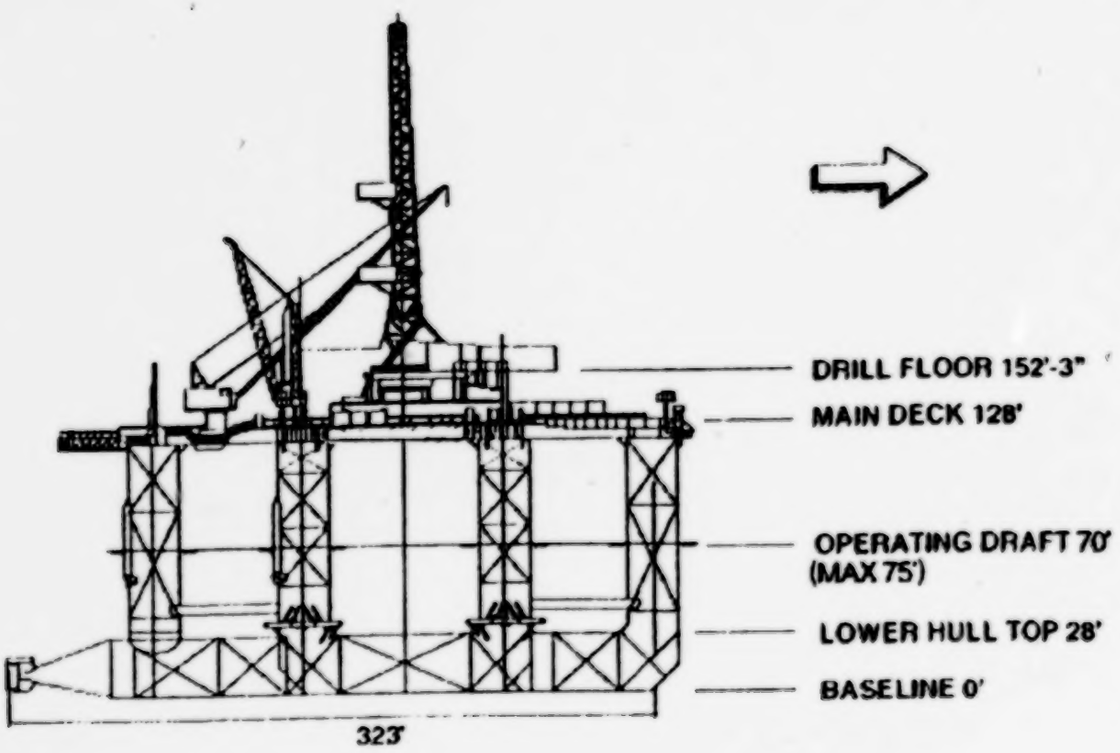
Top View

Specifications Page



Appendix II

SEMI-SUBMERSIBLE



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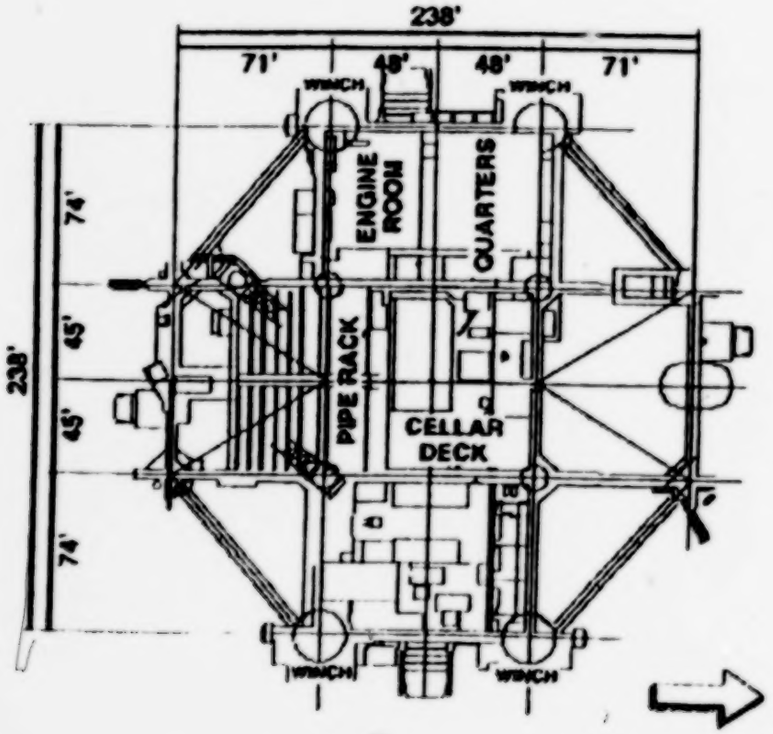
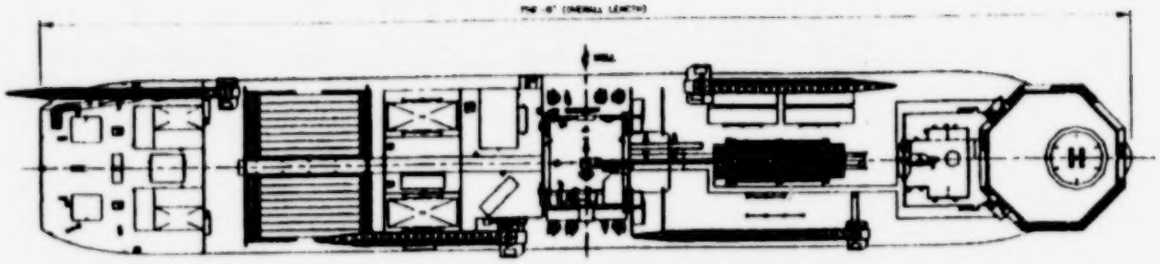
Specifications Page

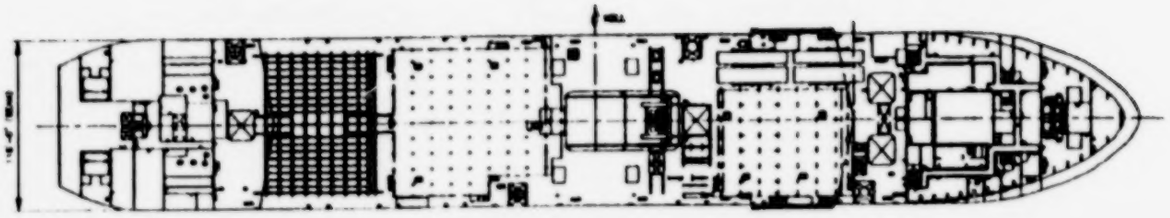


Appendix II

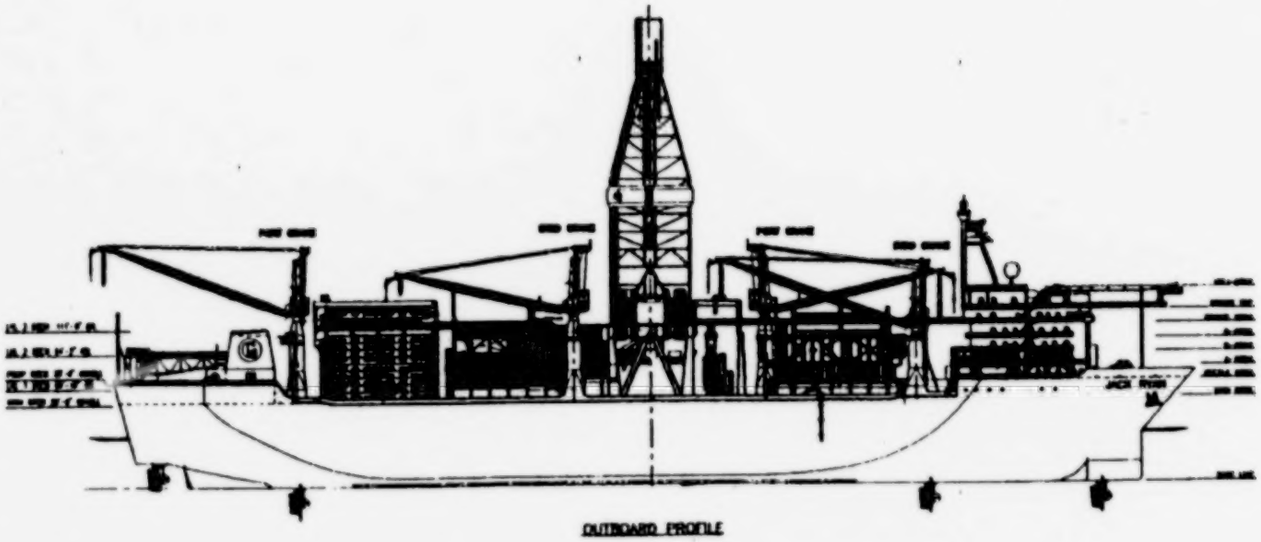
DRILL SHIP



PLAN VIEW



MAIN DECK



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No. 03-814

In The Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR THE SIGNAL MUTUAL INDEMNITY ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

To qualify for "seaman" status under the Jones Act, a worker must have an "employment-related connection to a vessel in navigation." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 357 (1995). What is the legal standard for determining whether a special purpose watercraft (such as a dredge) is a Jones Act "vessel?"

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INTEREST OF SIGNAL MUTUAL ASSOCIATION[1]

SIGNAL MUTUAL INDEMNITY ASSOCIATION (hereinafter "Signal" or "Association") is a non-profit mutual insurance association authorized under 33 U.S.C. §932(a)(2) to secure its Members' obligations as maritime employers to their maritime employees under the Longshore Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§901 *et seq.*, and its extensions, the Defense Base Act, 42 U.S.C. §1651 *et. seq.*, the Non-Appropriated Funds Instrumentalities Act, 5 U.S.C. §8171 *et. seq.*, and the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et. seq.* The Association comprises about 200 employers including stevedores, marine terminals, oil and gas exploration and drilling companies.

Signal's members need to know prospectively how to compensate an injured worker. Due to the ambiguities in the present system, any of their employees might at any point in time be classified as: (1) harbor workers covered by the LHWCA; (2) as land-based workers covered by state workers' compensation, or (3) as Jones Act seamen who are owed maintenance and cure.[2] An employer is obliged to

---

[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] Signal does not cover the employers' obligations under the Jones Act or under any state's workers' compensation statute. Signal will assist its Members to cover their crew risks under Maritime law through insurance provided by other insurance carriers who will sometimes insure these employers with an endorsement to the employer's liability section of a state workers' compensation policy, or as a separate liability policy which is often termed a protection and indemnity (P&I) policy.

pay automatically under each of these regimes. Although they are, theoretically, mutually exclusive,[3] Signal's members are required to insure themselves for each worker under each regime and oftentimes are required to pay under more than one regime, as they can be held liable under two regimes for the same injury at the same time. *See e.g., Figueroa v. Campbell Ind.*, 43 F.3d 311, 316 (9th Cir. 1995) (holding that injured employee was entitled to bring an action for his pain and suffering under the Jones Act, after recovering benefits for his unpaid wages and medical expenses from workers' compensation).

Employees of these Members who suffer injuries can first obtain compensation under the LHWCA.[4] Pursuant to section 20 of the LHWCA (33 U.S.C. §920) they are

[3] *See, e.g., Buras v. Commercial Testing and Engineering Co.*, 1985 AMC 1177, 1179, 736 F.2d 307, 309 (5th Cir. 1984); *Bertrand v. International Mooring & Marine, Inc.*, 1984 AMC 1740, 1742-43, 700 F.2d 240, 243 (5th Cir. 1983).

[4] The LHWCA compensation system is generous and was deliberately made so by the 1972 Amendments which substantially increased the compensation payments in return for the eliding of a longshoreman's rights to sue for unseaworthiness and the employer's freedom from liability on the basis of a warranty of workmanlike performance. *See* S.Rep. No. 92-1125, 92d Congress 2d Sess. (1972) ("The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels.") The compensation system contemplates payment of two-thirds of the average weekly wage of a harbor worker during temporary total disability. 33 U.S.C. §908(b). This is subject to a cap of approximately $1,000 per week which escalates for cost of living increases. 33 U.S.C. §906(b). Compensation payments are not taxable and therefore the harbor worker often receives amounts for disability that come close to their take-home pay while they work.

presumptively entitled to LHWCA benefits which an employer must pay or otherwise face penalties.[5] Having collected the benefits under the LHWCA, the employee is not precluded from later commencing Jones Act lawsuits to recover wages and pain and suffering. *See Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991); G. Gilmore & C. Black, *Law of Admiralty* 435 (2d ed. 1975).[6]

Worker's compensation is "part of a *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, it is relieved of the prospect of large damage verdicts." 2 *Larson's Workers' Compensation* §100.01 at 100-2 (Desk Ed.2003); *see also Peter v. Hess Oil V.I. Corp.*, 903 F.2d 935, 952 (3d Cir. 1990) (noting that permitting tort liability would obstruct "the purposes of LHWCA by depriving maritime employers of their side of LHWCA's *quid pro quo*. . . ."). No such balance is struck when harbor workers are indistinguishable from seamen. When the employee brings a Jones Act lawsuit, he has not elected LHWCA benefits and the jury is entitled to decide whether he is a seaman under the Jones Act. *Southwest Marine*, 502 U.S. at 91. He can then be compensated for lost wages and pain and suffering by a jury in generous amounts. *See e.g., Figueroa*, 43 F.3d at 316; *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1053 (5th Cir. 1983) (making reference to the

[5] *See* 33 U.S.C. §914(e) (10% penalty for installment not paid within 14 days when it is due with award); *Id.* §914(f) (20% penalty for installment not paid within 14 days of when it is due with award).

[6] Further, because the two regimes have separate systems to resolve disputes there is no single forum which can address the question in the alternative. *See Harbor Tug and Barge v. Papai*, 520 U.S. 548 (1997).

"lucrative" Jones Act recovery). The employer who assumed a liability without fault and pays compensation receives no relief from the large verdicts whose avoidance was supposed to be part of the *quid pro quo*. *See Larson*, §100.01 at 100-2; *see also Peter,* 903 F.2d at 952.

SUMMARY OF ARGUMENT

To provide much needed certainty to all participants in the compensation systems, a rule which clearly defines a vessel under both the Jones Act and LHWCA and which can be easily applied is needed.[7] Signal and its Members respectfully urge a rule that removes the ambiguity surrounding the meaning of "master or member of the crew of any vessel," under 33 U.S.C. §902, such that it would be clear who is a seaman and who is a harbor worker which would result in only a single insurance coverage for each employee and payment to the employee under one compensation system.[8]

Congress intended continuity between the benefits received by the worker on the job with the benefits received while disabled. Disabled Jones Act seamen receive

[7] In *Davis v. Department of Labor and Industries of the State of Washington*, 317 U.S. 249 (1942) (Stone, J., dissenting), it was urged that a similar rule designed to avoid the "twilight zone" should be adopted. A solution which allows a "case by case" determination serves no purpose. *See Randall v. Chevron*, 13 F.3d 888 (5th Cir. 1994); *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999); and *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (5th Cir. 1991) (demonstrating the dangers of complicating analysis of employment classifications on a case by case basis focused on inherently subjective trigger mechanisms).

[8] With one compensation scheme also comes the benefit of one forum for the resolution of disputes related to the compensation.

maintenance and cure,[9] because it is the equivalent of the food, care and lodging received while living aboard the vessel. *O'Connell v. Interocean Mgmt. Corp.*, 90 F.3d 82, 84 (3d Cir. 1996). Thus, a Jones Act vessel should be clearly identified as one which having furnished food, care and lodging to the seaman while working on the vessel, provided maintenance and cure as the equivalent while disabled. *Barnes v. Andover*, 900 F.2d 630, 634-35 (3d Cir. 1990). In other words, the vessel is a "home." *See Weiss v. Central Railroad Co. of New Jersey*, 235 F.2d 309, 314 (2d Cir. 1956) (Lumbard, J., dissenting). This easily distinguishes the Jones Act vessel from the vessel which provides no food, care or lodging and therefore must respond under the LHWCA.

Congress intended such a rule to implement its preference for worker's compensation.[10] The worker's compensation remedy is preferable for a number of reasons. First, LHWCA requires a prompt payment of compensation benefits with significant penalties for failure to make prompt payment. 33 U.S.C. §914. Secondly, the worker's compensation payments under the LHWCA are generous and enable the employee to live comfortably; by contrast, the Jones Act seaman who is not covered by the LHWCA must survive on maintenance and cure which consists of food and lodging expenses only for himself and not his family. *Cf. Macedo v. F/V Paul and Michelle*, 868 F.2d 519 (1st Cir. 1989) (reversing district court increase of

[9] Maintenance is the right of seaman to food and lodging if he falls ill or becomes injured in the service of the ship. Cure is the right to necessary medical services. *See* 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law*, §6-9 at 290 (4th Ed. 2003).

[10] *See* Section II *infra*.

maintenance payments from $10 per day to $40 per day and noting that "[m]aintenance and cure is strictly personal, not family support."); *Service Eng. v. Emery,* 1997 AMC 395, 397-98 (9th Cir. 1996) (commenting on generous federal LHWCA benefits). Thirdly, maritime employees are presumptively covered under the LHWCA under which compensation payments are automatically payable and do not require counsel in order to claim payments. *See* 33 U.S.C. §920. By contrast, a Jones Act lawsuit is ordinarily filed by an attorney, whose compensation is contingency based on usually one-third of the recovery. Fourthly, payments under the LHWCA are financially secure under a mandatory insurance program supervised by the U.S. Department of Labor. 33 U.S.C. §932. No such mandatory insurance exists under the Jones Act leaving employees to the discretion of their employer for insurance coverage and even insured Jones Act employers are vulnerable to the potential of insolvency of their insurers.

Adopting the "vessel as a home" test, which an analysis of legislative history will show to be the test intended by Congress, will result in a more efficient system of maritime workers' compensation with lower insurance premiums, more prompt compensation payments, less attorney and judicial resources and less litigation and transaction costs. It will also ease the fundamental unfairness to workers, employers and insurers posed by the two incompatible compensation systems.

ARGUMENT

I. A JONES ACT VESSEL FURNISHES FOOD, LODGING AND CARE ON THE VOYAGE

Petitioner and supporting *amicus curiae* have argued that the definition of a Jones Act vessel should be as broad as Congress has given the definition of "vessel" for admiralty jurisdiction purposes.[11] This argument fails to ascertain the intent of Congress in enacting both the Jones Act and the LHWCA, which clearly demonstrates that Congress did not intend for every vessel subject to admiralty jurisdiction to be a Jones Act vessel.

A. Only Vessels on Voyages Away from Home Employed Seamen Who Were Entitled to Maintenance and Cure

To understand Congressional intent in enacting the Jones Act, it is necessary to consult the rights of injured seamen before the passage of the Jones Act in 1920. Unlike the treatment of a "vessel" for purposes of admiralty jurisdiction, the 19th Century courts differentiated vessels on the basis of their liability to compensate a seaman for maintenance and cure as opposed to those

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[11] Historically, the term vessel was given the broadest definition, so as to avoid having admiralty jurisdiction turn on artificial distinctions based on the vessel's size, use, propulsion or lack thereof:

> A scow, a lighter, a ferry-boat, and probably a raft or timber ship, under certain circumstances, would be held to be a ship or vessel, and subject to the same maritime law as other vessels. It is not the form, the construction, the rig, the equipment, or the means of propulsion that establishes the jurisdiction, but the purpose and business of the craft as an instrument of naval transportation.

Erastus C. Benedict, *The American Admiralty*, §218 at 122 (1850).

which had no such liability. Drawing on ancient jurisprudence,[12] the courts charged the ship on a foreign voyage with costs of curing mariners stranded ashore in foreign ports. *See Harden v. Gordon*, 11 F.Cas. 480 (D.Me. 1823). *See also, Barnes*, 900 F.2d at 637 (noting that the adjectives "friendless" and "helpless" as used by the *Harden* court were generally used to describe sailors in foreign ports). It was soon recognized that the voyage need not be foreign; the maintenance and cure obligation attached to vessels employed on voyages in "navigable fresh waters." *The Ben Flint*, 3 F.Cas. 183 (D.Wis. 1867). However the voyage had to take the mariner away from home to trigger the requirement of maintenance and cure: "the same consideration under the rule may not be extended indiscriminately to all classes of seamen . . . the same liberality need not be extended to a seaman shipping for a voyage for a few days on the lakes. . . ." *Id.* If the crewmember was close to home where he could obtain medical treatment, then he was denied cure at the expense of the ship. *The J.F. Card*, 43 F. 92 (E.D. Mich. 1890).

A voyage away from home was the basis for a maintenance and cure award. *See Reed v. Canfield*, 1 Sumner 195, 202, 20 F.Cas. 426 (C.C.D. Mass. 1832).[13] The voyage

[12] By general maritime law, if a seaman fell sick during the voyage, he was to be cured at the expense of the vessel. *See* Laws of Oleron Art. 7; Laws of Wisbuy, Art. 19; Laws of the Hanse Towns, Art. 45, *see also Harden v. Gordon*, 11 F.Cas. 480 (1823).

[13] The connection between maintenance and cure and a voyage was premised on the crewmember having a stake in the voyage:

> But the truth is that the maritime law furnishes entirely different doctrines upon this, as well as many other subjects from the common law. Seamen are in some sort co-adventurers upon the voyage, and lose their wages upon casualties which do not affect artisans at home. They share

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requirement also triggered the vessel's liability for wages: if a seaman fell ill or injured on the voyage and had to be discharged before the voyage was completed, the wages were paid to the end of the voyage but not beyond the voyage, at least where the ship was faultless. *See Great Lakes S.S. Co. v. Geiger*, 261 F. 275, 277-78 (6th Cir. 1919). Nor was maintenance and cure originally paid beyond the voyage. *See Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938). The courts struggled with whether liability for maintenance and cure extended beyond the voyage, with the lower courts at the turn of the 20th Century leaning in favor of extending cure and attendant lodging for sick seamen beyond the voyage. *See id; The Mars*, 149 F. 729 (3d Cir. 1907); *Benedict on Admiralty*, §83 at 131 (5th Ed. 1925).[14] However, the ultimate extension of seamen's rights to maintenance and cure beyond the voyage did not imply or forecast the extension of the class of maritime workers who were entitled to maintenance and cure.[15]

> the fate of the ship in cases of ship-wreck and capture. The policy of the maritime law, for great and wise and benevolent purposes, has built up peculiar rights, privileges, duties and liabilities in the sea service which do not belong to home pursuits.

The City of Alexandria, 17 F. 390, 395-96 (S.D.N.Y. 1883) (quoting *Reed v. Canfield*, 1 Sumner 195, 20 F.Cas. 426 (C.C.D. Mass. 1832)).

[14] The courts were not in unison in extending maintenance and cure beyond the voyage. Many courts allowed maintenance and cure beyond the voyage in situations where the treatment had already begun and was to continue past the time of the voyage and to other situations where the ship failed to provide competent maintenance and cure. *See The City of Alexandria*, 17 F. 390 (S.D.N.Y. 1883); *Brown v. Overton*, 4 F.Cas. 418 (D. Mass. 1859).

[15] *See Calmar S.S. Co. v. Taylor*, 303 U.S. 525 (1938) and note 20 *infra*.

B. The Jones Act only Applied to Vessels on Voyages Away from Home

The *Osceola*, 189 U.S. 175 (1903) linked maintenance to the voyage away from home by confirming that maintenance was payable "at least so long as the voyage is continued," but denied seamen a negligence remedy.[16] Congress enacted the Jones Act in 1920 which established a negligence remedy for *The Osceola* seamen. 46 U.S.C. §688 *et. seq*. While the Jones Act contained no reference to a "vessel," Jones Act seamen were later defined to be the masters or members of a crew of any vessel within the meaning of LHWCA. 33 U.S.C. §902; *see also Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946). Jones Act vessels were those whose seamen were entitled to maintenance and cure and wages to the end of the voyage, as the only purpose of the Jones Act was "to remove the bar created by *The Osceola*, so that seamen would have the same rights to recover for negligence as other tort victims." Gilmore & Black, *Law of Admiralty*, §328-329 (2d Ed. 1975), quoted in *McDermott International v. Wilander*, 498 U.S. 337, 342 (1991). Thus, Jones Act seamen are *Osceola* seamen working on vessels that embarked on voyages away from home. There is no evidence of a Congressional attempt to embrace within the Jones Act all workers who worked on "every description of watercraft or other artificial contrivance used, or capable of

[16] In *The Osceola*, 189 U.S. 175 (1903), the court codified the ill and injured seaman's rights into four propositions: (1) the sick or injured seaman was entitled to maintenance and cure "at least so long as the voyage is continued"; (2) the seaman may recover indemnity for injuries sustained as a result of unseaworthiness; (3) the seaman cannot recover from the owner for injuries sustained through the negligence of fellow servants; (4) the seaman is not allowed to recover for the negligence of the master or member of the crew beyond maintenance and cure. *Id*. at 175.

being used, as a means of transportation on water." 1 U.S.C. §3.

This easy classification of Jones Act vessels and seamen would have been more easily discerned were it not for the Court's humane decision in *International Stevedoring Co. v. Haverty*, which gave maritime workers who lacked any compensation remedy under state or federal law[17] a Jones Act remedy, despite their work on vessels which did not embark on voyages and which did not provide food, care or lodging. 272 U.S. 50 (1926). *Haverty* created a new class of Jones Act seamen. *Id*. One court held that this new class of "seaman" was not entitled to maintenance and cure. *See Flanagan & Sons, Inc. v. Carken*, 11 S.W.2d 392 (Tex. Civ. App. 1928). But the issue was never seriously litigated, as Congress overruled *Haverty* in enacting the LHWCA in 1927.

C. With The Passage Of The LHWCA, Congress Intended Only To Exclude Those Mariners Who Were Entitled To Maintenance And Cure And Wages To The End Of The Voyage

All seamen were initially included in the House Bill and to avoid the exclusion of any inland vessel workers,

[17] As to the workers who were maritime employees but outside of the Jones Act, this Court held unconstitutional an attempt to apply state worker's compensation to any worker whose injury occurred seaward of the gangplank. *See Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). Congressional attempts to apply state law to injuries seaward of the gangplank were similarly rebuffed in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

the House created a laundry list of watercraft that were subject to the LHWCA:

> This Act shall apply to any maritime employment performed –
>
> * * *
>
> (B) As master or member of a crew of a barge, lighter, tug, dredge, vessel, or other ocean, lake, river, canal, harbor or floating craft owned by a citizen of the United States.[18]

At the same time, Congress reserved to "the masters or members of the crew" maintenance and cure and their "wages to the end of the voyage." H.R. Report No. 1767, 69th Cong. 2d Sess. at 20 (1927). The legislative history makes it clear that Congress connected the "vessels" to a voyage:

> The bill has been amended so as to provide the benefits of compensation to seamen, or, to use the language of the bill, 'to masters and members of the crew.' As to this class of workers, the bill provides that they are to receive compensation, in addition to their right to maintenance and cure, and wages to the end of the voyage as now provided by maritime law.[19]

This class of workers referred to the Jones Act seamen who had previously received maintenance and cure and wages to the end of the voyage.[20] Congress intended to

[18] H.R. No. 1767, 69th Cong. 2d Sess. at 2 (1927)

[19] H.R. Report No. 1767, 69th Cong. 2d Sess. at 20 (1927).

[20] Those rights were not extended to the laundry list of vessels whose workers were to be conferred rights under the LHWCA, namely, the crew of the barges, lighters, tugs, dredges or other ocean, lake,

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overrule the Jones Act but to preserve those two unique rights peculiar to seafarers who embarked on voyages away from home. This narrow class, the Jones Act seamen, but none other, was, for the reasons stated below, excised from the LHWCA.

The International Seaman's Union protested the inclusion in the LHWCA of the Jones Act seaman.[21] In response, Congress exempted "master or member of a crew on any vessel" from the LHWCA. The exemption did not include the laundry list of floating craft that had previously been included in the LHWCA and it is clear that, in amending the bill, Congress excised only the class of seamen who were entitled to maintenance and cure and wages to the end of the voyage.[22]

river, canal, harbor or floating craft who were also to be included in the LHWCA. *See* H.R. No. 1767.

[21] Testimony before the House Judiciary Committee by Andrew Furuseth, President of the International Seaman's Union of America, outlined the difference between Jones Act seamen and harbor workers:

> When a man is working in a harbor or on shore, and he, using his eyes and his understanding can see that there is grave danger of him being seriously hurt or maimed or killed, there is nothing to hinder that man from taking off his overalls, putting on his coat and saying, 'no, I will not do that work.' He can do that, and go away and nobody can say anything to him.
>
> But where a vessel is at sea the seaman must obey orders, he has got no choice. He is in the same position as the soldier in the front line of a battle. He is there to obey such orders as are given to him by his superior officers, regardless of whether he is risking his life in so doing or not.

H.R. No. 9498, 69th Cong., 1st Sess. at 104.

[22] This implicates the statutory construction rule "inclusio unius est expresio alterius." *See People v. Island Wide Ins. Brokerage*, 177 Misc. 2d 668, 670 (NY Dist. Ct. Nassau County, 1998) (citing Black'

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There is no evidence to suggest that Congress implicitly amended the Jones Act by excluding from the LHWCA (and therefore adding to the Jones Act), seamen who worked on those vessels that did not embark on voyages away from home and who therefore were not eligible for maintenance and cure. Nor is there a scintilla of evidence that Congress engaged in only a partial overrule of *Haverty* by confirming that Court's creation of a new class of Jones Act seamen who were not lodged, fed or cared for by the vessel. In short, a Jones Act seaman returned to what he was before *Haverty*, namely, one entitled to maintenance and cure and wages to the end of the voyage.[23] As a result, the *Haverty* seamen became covered by the LHWCA, not the Jones Act.[24]

Law Dictionary, 6th Ed.). The House Bill reported that the LHWCA would cover a "barge, lighter, tug, *dredge*, vessel or other ocean, lake, river, canal, harbor or floating craft. . . ." H.R. No. 1767, 69th Cong. 2d Sess. at 2 (1927) (emphasis added). Congress deleted "a master or member of a crew of any vessel" from coverage. By listing only the term "vessel" in its exclusion, it is fair to infer that the other "floating craft" were to maintain LHWCA coverage.

[23] The "voyage" continued to play a major role in Jones Act jurisprudence as in 1937, the Court in *Calmar S.S. Co. v. Taylor*, 303 U.S. 525 (1938), laid to rest the issue at the turn of the 20th Century concerning the length of payment of maintenance and cure and extended maintenance and cure for the sick or injured seaman past the end of the voyage, until the point of maximum cure. Clearly, the rights to maintenance and cure continued to be connected to a vessel on a voyage.

[24] Congress intended the LHWCA to cover all those maritime workers who could not be covered by state laws. *See* 1 Force & Norris, *The Law of Seamen*, §2:6 at 2-23 (2003).

D. The Vessel On A Voyage Away From Home Was The Seaman's Home And Therefore Was A Jones Act Vessel

The vessel on a voyage away from home provided food, care and lodging to the seaman which was to continue during the seaman's disability. *See The Henry B. Fiske*, 141 F. 188 (D. Mass. 1905) (holding that a seaman is to receive the same value of room and board that he was receiving while he was on the ship). As it was before *Haverty*, the Jones Act vessel was a "home" or a "place to live" for the seaman as set forth in Judge Lumbard's dissenting opinion in *Weiss v. Central Railroad Co. of New Jersey:*

> The most important single factor which has justified the creation of the remedy for seamen and for no one else is, I think, the peculiar relation of the seaman to his ship. The typical seaman looks to his ship, not only as the place where he works, but as a home. It is his 'framework of existence.' *Aguilar v. Standard Oil Co., supra*, 318 U.S. at 732. Thus, when sickness makes it impossible for him to work on the ship, he is deprived of a place to live as well as a place to work. Under these circumstances, it was appropriate to require the shipowner to provide him with a means of maintaining himself during his illness.

235 F.2d 309, 314 (2d Cir. 1956) (Lumbard, J., dissenting).[25]

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[25] The *Weiss* majority found that the "vessel" was engaged on a "voyage" by making short trips in the harbor. 235 F.2d at 313. Such a holding unnecessarily dilutes the meaning of a "voyage" for maintenance and cure purposes. *See The Ben Flint, supra*.

The Court's previous decisions are not inconsistent with a "vessel as a home" test under the Jones Act. In *Norton v. Warner*, the employee worked on a barge that had no motive power of its own, but the barge provided him with quarters. 321 U.S. 565 (1944). He bought his own meals and lived, ate and slept on the barge. And he was continuously aboard. 321 U.S. at 567. The court reversed the Deputy Commissioner's finding that he was entitled to compensation under the LHWCA, and found that he was "a master or member of a crew of any vessel." Dictum in the case might suggest a broader meaning to the word "vessel,"[26] but the Court did not have to address the limits of the meaning of a vessel under the Jones Act. Accordingly, *Norton* cannot be seen to be controlling authority for broadening the meaning of the word "vessel" in the LHWCA beyond a vessel which provides the seaman with a home or a place to live.

In several cases in the late fifties, the issue of Jones Act vessel status arose but these decisions provided no clear authority on the contours of a Jones Act vessel.[27] For

[26] "A barge is a vessel within the meaning of the act even when it has no motive power of its own, since it is a means of transportation on water." *Id.* at 571 (citations omitted).The court did refer to Revised Stat Section 3, 1 U.S.C. §3 which defines a vessel as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." *Id.* at 571 n.4.

[27] Other cases have addressed the issue of whether the vessel was "in navigation." However, these cases are not apposite here, because the question is not whether there was anything in navigation but whether there was a "vessel" as Congress intended the meaning in determining whether the LHWCA benefits or Jones Act rights would apply. *See Desper v. Star Rock Ferry Co.*, 342 U.S. 187, 188 (1952) (an employee who was cleaning, painting and waterproofing boats which had been beached for the winter was not a seaman under the Jones Act, as he was not doing seaman's work but work which "customarily (would) be

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instance, in *Senko v. LaCrosse Dredging*, an employee aboard a dredge was held to be a Jones Act seaman but the court specifically excluded from consideration whether the dredge was a "vessel." *See* 352 U.S. 370, 371 n.1 (1957) ("no question has been raised at any time as to whether the dredge involved here had the status of a 'vessel' at the time of Petitioner's injury"). Nor did the Court reach the issue in *Gianfala v. Texas Co.*, despite holding that an employee who played a part in the operation of moving a barge was entitled to have the jury decide whether he was a Jones Act seaman. 350 U.S. 879 (1955) (per curiam).

The issue of what was a Jones Act vessel was discussed only in the dissent in *Grimes v. Raymond Concrete Pile Co.*, which was a short, per curiam decision reversing the First Circuit which had held that a pile driver, who worked on a fixed tower and who sustained injuries while being transferred at sea in a "Navy life ring" from a tug to the Texas Tower was not a seaman. 356 U.S. 252 (1958). The case, however, does not answer the question posed by Justice Harlan in his dissent, "[p]resumably the court does not consider as a vessel this man-made island, the Texas Tower, which was securely fixed to the ocean bed before petitioner was injured."[28]

done by exclusively shore-based personnel"); *West v. United States*, 361 U.S. 118 (1959) and *Roper v. United States*, 368 U.S. 20 (1961) (ships that had been laid up in the "mothball fleet" were withdrawn from navigation, so as not to be vessels in navigation for purposes of the Jones Act); *Butler v. Whitman*, 356 U.S. 271 (1958) (the tug or barge from which the employee fell and drowned were not in navigation).

[28] *Id.* at 255 (Harlan, J. dissenting).

Nonetheless, if the Texas Tower in *Grimes* was a "vessel" under the Jones Act and LHWCA, such an interpretation is not inconsistent with a "vessel as a home" test, since it provided food and lodging to the crew.[29]

More recent decisions which concerned the necessary connection of the seaman to the vessel are not dispositive and do not address whether a Jones Act vessel is limited to a certain class. In *Southwest Marine v. Gizoni*, the issue was not whether the moving platform was a Jones Act vessel but merely whether the employee working a listed occupation under the LHWCA was precluded from being a Jones Act seamen. 502 U.S. 81, 92 (1991). ("Because a ship repairman may spend all of his working hours aboard a vessel in furtherance of its mission – even one used exclusively in ship repair work – that worker may qualify as a Jones Act seaman.")

Similarly, in *McDermott International v. Wilander*, 498 U.S. 337 (1991); *Chandris v. Latsis*, 515 U.S. 347 (1995), and *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997), the ships on which the employees worked did provide food, lodging and care to the employees, but the question was whether the employees had the requisite connection to the vessel to qualify as Jones Act seamen. *Wilander*, 498 U.S. at 364. ("[I]t is not the employee's particular job that is determinative, but the employee's connection to a vessel.") Thus, none of the Court's prior

[29] In *Grimes* the court noted "when the tower was towed to sea, petitioner with about 25 other workmen lived on the tower and kept it in condition by operating air compressors, generators, and pumps to expedite installation at the permanent site, as well as by performing certain functions to keep it in safe tow." 356 U.S. at 254.

cases preclude the adoption of the "vessel as a home" test for Jones Act vessels.

Except for the Second Circuit's decision rejecting the "vessel as a home" definition in *Weiss*,[30] no circuit court has attempted to explore the connection between the definition of "vessel" and legislative history in distinguishing the Jones Act from the LHWCA. Several tests have evolved for defining a "vessel" under the Jones Act, some of which attempt to distinguish vessels which are or are not covered by the Jones Act on the basis that certain vessels present risks peculiar to seamen which Congress intended to be covered by the Jones Act. It is submitted that such tests have no grounding in legislative history and are impractical to administer. The First Circuit in this case and in *DiGiovanni v. Traylor Bros., Inc,* 959 F.2d 1119 (1st Cir. 1992) (*en banc*) held that a Jones Act vessel must be primarily used in transportation of cargo or passengers, and if not, then it must be actually navigating at the time of injury. The Sixth Circuit in *Hatch v. Durocher Dock and Dredge, Inc.*, 33 F.3d 545 (6th Cir. 1994), and the Seventh Circuit in *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054 (7th Cir. 1984), follow this approach.

[30] One court has defined the claimant's connection to a vessel in terms that would support a "vessel as a home" test. For example, in rejecting the application of admiralty jurisdiction for an injured employee working on a barge, the concept of a permanent attachment to a vessel or fleet of vessels was discussed in *Whittington v. Sewer Construction Company, Inc.*, 541 F.2d 427 (4th Cir. 1976), where the court noted that the claimant neither "took his meals or slept on any of the barges or towing vessels." *Id.* at 436. This language presents a clear parallel to the *Weiss* "vessel as a home" test. *See also Thibodeaux v. J. Ray McDermott & Co.*, 276 F.2d 42 (5th Cir. 1960) (refusing to find Jones Act status as the injured maritime employee "was a regular shore worker. He lived, ate and slept at home.")

The Fifth Circuit requires that the vessel must have been built with the intent of performing a transportation function and transportation had to be an important part of the vessel's business at the time of the accident. *See Manuel v. P.A.W. Drilling & Well Service*, 135 F.3d 344 (5th Cir. 1998). The Second Circuit approved part of the Fifth Circuit's test but rejected the need for the vessel to be built for transportation purposes and focused instead on its present use as a means of transportation or a work platform. *See Tonneson v. Yonkers Contracting Co.*, 82 F.3d 30 (2d Cir. 1996).

Finally, the Ninth Circuit defines a Jones Act vessel as to what it was not. *See Martinez v. Signature Seafoods*, 303 F. 3d 1132, 1135 (9th Cir. 2002) (*quoting Katriner v. Unisea, Inc.*, 975 F. 2d 657, 660 (9th Cir. 1992)). A vessel is not a Jones Act vessel if it is "'incapable of independent movement over water, [is] permanently moored to land, ha[s] no transportation function of any kind, and ha[s] no ability to navigate.'"

Missing from these cases is discussion on the legislative history as to the meaning of "vessel" under the LHWCA which, in turn, defines a Jones Act vessel. It is submitted that the link between the meaning of "vessel" and the differences between the Jones Act and the LHWCA must be explored.

II. THE TERM "VESSEL" SHOULD BE INTERPRETED IN ACCORDANCE WITH THE ENDS TO BE ATTAINED BY THE LHWCA AND JONES ACT

No "transportation function" reference can be found in the legislative history of the Jones Act or the LHWCA in reference to vessels. Further, nothing in the legislative history of the LHWCA or the Jones Act supports the proposition that Congress intended the word "vessel" to have the broad, jurisdictional meaning in the Rules of Construction Act. 1 U.S.C. §3.

Arguing essentially that the term "vessel" in the LHWCA carries old statutory baggage, Petitioner and *amici* have pointed to a "cardinal rule of statutory construction" that where Congress borrows terms of art which have accumulated in the legal tradition in meaning of centuries of practice, it adopts the cluster of ideas that were attached to the borrowed word in the body of learning from which is was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. Petitioner's Brief at 13 (quoting *Molzof v. United States*, 502 U.S. 301, 307 (1992)); *see also Wilander,* 498 U.S. at 342. However, this cardinal rule must yield to anther tenet of statutory construction. Statutory language "must be read in light of the mischief to be corrected and the end to be attained." *Wilander*, 498 U.S. at 349 (*quoting Warner v. Goltra*, 293 U.S. 155, 158 (1934)).

Both the LHWCA and the Jones Act were statutes meant to provide relief to different sets of maritime workers. In the case of *Osceola* seamen, attempts to confer a negligence remedy had been thwarted, *see Chelentis v. Luckenbach S.S. Co.,* 247 U.S. 372 (1918), and had finally succeeded with the Jones Act. In the case of maritime

workers who were not *Osceola* seamen, Congress searched for a valid compensation remedy when state laws could not be constitutionally applied to these workers. *See Southern Pacific,* 244 U.S. at 215.

In enacting the LHWCA, Congress demonstrated a clear preference for compensation benefits over common law suits:

> Workmen's compensation has come to be universally recognized as a necessity in the interest of social justice between employer and employee. It is the modern substitute for the old common-law remedy afforded through actions at law for damages, and promptly affords relief to the injured employee by furnishing medical attendance and supplies immediately upon the occurrence of the injury or as soon thereafter as possible and compensation during the period of his illness or inability to pursue his usual employment, and in case of death, financial assistance to his dependents, without the delay and expense which an action at law entails.

H.R. Report No. 1767 *supra*. at 20.

Congressional preference for the worker's compensation remedy must be read with a practical examination of the differences between a Jones Act seaman and a harbor worker, in order to devise a valid test for what is a vessel under both the Jones Act and the LHWCA. There are distinct differences between the two. These differences assist in articulating a bright line test.

A defining feature of a Jones Act seaman is that he or she receives food, lodging and medical care aboard the vessel and is entitled to a continuance of that maintenance and care, when he is separated from the ship due to

disability as a result of illness or injury in the service of the ship. *Calmar S.S. Co. v. Taylor*, 303 U.S. 525 (1938); *Cortes v. Baltimore Insular Lines*, 287 U.S. 367 (1932). It is not an award of compensation for damages for the disability a seaman suffers. *See Calmar,* 303 U.S. at 528. When a Jones Act seaman is taken ill or injured on a ship, the shipowner must provide for the equivalent food, lodging and care that is comparable to what the seaman received aboard the ship. *Id*. This doctrine of maintenance and cure is steeped in ancient jurisprudence going back to the Code of Oleron. *See Oleron Sea Code*, Laws of Oleron, Art. VI (quoted in 1 *Benedict on Admiralty*, 1-22 (7th Ed. 1974)). It cannot be contracted away. *See Harden v. Gordon*, 11 F. Cas. 480 (C.C.D.Me. 1823) (Story, J.); *Barnes*, 900 F.2d at 637.

The maintenance and cure obligation exceeds the scope of LHWCA compensation. Unlike a land worker who must show disability "arising out of employment," to receive maintenance and cure, the Jones Act seaman need not prove any causation between the injury/illness and his employment. *See Force & Norris, supra*, §26:2 at 26-5. The illness or injury need only manifest itself "in the service of the ship and therefore is often sustained or contracted before the seaman joins the ship." *Id.* Unlike the harbor worker who must prove a work related injury, the seaman need not be at work aboard the vessel to claim maintenance and cure for any injury or illness he suffers. *See Aguilar v. Standard Oil*, 318 U.S. 724 (1943), (holding injury on shore leave qualifies for maintenance and cure). So long as the seaman is answerable to the call of the ship at the time disability occurs, he is entitled to maintenance. *See Farrell v. United States*, 340 U.S. 511 (1949).

The continuity of the benefits paid to the seaman in disability is the key to the definition of a Jones Act vessel.

The Jones Act obligation follows the maintenance and cure obligation, which is the extension during disability of benefits the seafarer received while working on the ship. If he received food, care and lodging while working, he should receive it in disability.

It is awkward and unnecessary to extend those benefits during the disability of maritime workers who receive no such food, lodging or medical care aboard the vessel but who are eligible for compensation under the LHWCA. On the other side of that coin, it would be harsh to deny immediate LHWCA compensation benefits to a maritime worker on a vessel that does not provide food, lodging or care and to force the worker to accept maintenance and cure on the basis that he worked on a vessel broadly defined to be a Jones Act vessel by a standard wholly unconnected to the legislative history of the Jones Act and LHWCA. Nor can any Congressional intent be discerned that the definition of a vessel be sufficiently ambiguous to allow the worker to pursue both remedies, which is the state of the law today.

III. THE DREDGE IN THIS CASE WAS NOT A JONES ACT VESSEL

One of the advantages of the "vessel as a home" test for Jones Act vessels is the ease and clarity of its application in court in Jones Act cases and by Administrative Law Judges in LHWCA cases. The bright line drawn by the Court with the "vessel as a home" test will rarely result in factual issues necessitating a jury decision on whether the seaman worked on a Jones Act vessel. If the vessel provided food, care and lodging to the seaman, it is a Jones Act vessel.

Summary judgment was appropriate here. The SUPER SCOOP was not Petitioner's home but it was his workplace. J.A. 45. The Petitioner did not sleep on the SUPER SCOOP. J.A. 17, 45. He did not receive any medical care aboard the dredge and, although there were dining facilities, there is no record of a cook or anyone to provide Petitioner with meals aboard the dredge. *Id.* Accordingly, Petitioner received no food, care or lodging aboard the dredge and it would be awkward and unnecessary to provide him with the maintenance and cure, when he did not receive such maintenance, care or cure when he worked aboard the vessel.

Here, there are no such facts that could place the SUPER SCOOP into a category of a home, where the seaman is fed, lodged or cared for. Because the Petitioner did not sleep aboard the vessel or was not cared for by the vessel the Petitioner is similar to a land-based worker. J.A. 17, 45. There is no jury issue to determine if the vessel provided him with food care or lodging. The vessel was his workplace and he was entitled to LHWCA compensation. Consequently, no genuine issue of material fact as to whether the SUPER SCOOP is a Jones Act vessel under the meaning of the Jones Act and LHWCA arose and therefore the District Court was correct in rendering summary judgment. *See* Fed.R.Civ.P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

CONCLUSION

WHEREFORE, Signal respectfully joins the Respondent in asking that this Court affirm the decision below and for identifying that in order for a watercraft to be a Jones Act vessel, the watercraft must act as the injured seaman's home in providing food, care and lodging.

Respectfully submitted,

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IN THE

Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR T. W. LAQUAY DREDGING, INC. AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

To qualify for seaman status under the Jones Act, a worker must have an employment-related connection to a vessel in navigation. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 357 (1995). What is the legal standard for determining whether a special purpose structure (such as a dredge) is a Jones Act vessel.

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Treatise:

THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW (West 4th ed. 2004) 3, 4, 5

I. Interest of T. W. LaQuay Dredging, Inc.[1]

T. W. LaQuay Dredging, Inc. (LaQuay) is a small, family-owned Hub Zone certified dredging and marine construction company located in Port Lavaca, Texas. The company was founded July 15, 2000, and currently owns two 20-foot hydraulic cutter head dredges (the JASON LAQUAY and the JOHN C. LAQUAY), along with five dredge tenders, one tow boat, three anchor barges, a survey boat, and various other pieces of supportive equipment. The dredge, JASON LAQUAY, has combined total horsepower of 3,250, is capable of dredging in excess of 60 feet in depth, and can pump maintenance material in excess of 20,000 feet. The dredge, JOHN C. LAQUAY, has a total combined horsepower of 7,760, is capable of dredging in excess of 60 feet in depth, and can pump maintenance materials in excess of 25,000 feet.

LaQuay files this Amicus Brief in support of Respondent, Dutra Construction Company. This Court's ruling on the legal standards for determining whether a special purpose structure is a moored work platform dredge, will directly affect LaQuay and its employees.

---

1. This brief has been authored in its entirety by undersigned counsel for the *amicus curiae*. No person or entity, other than the named *amicus* and its counsel, made any monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief and their letters of consent are being lodged herewith.

II. Statement

A. *Factual Background*

There is no dispute that the Super Scoop is a large floating platform equipped with a clam shell bucket. Pet. App. 16-17. Like all dredges, the Super Scoop operates as a dredge removing silt from the ocean floor. Here, the Super Scoop was used to dig a cross-harbor trench in the Boston Harbor for the Ted Williams Tunnel. *Id.* at 17. The Super Scoop was secured in place during all of its primary operations using traditional anchors and/or cables, or other mooring devices while the Harbor sediment was removed from the ocean floor.

Because the Super Scoop, like many, if not all dredges, is a non-self-propelled structure, it was moved to the work site in Boston Harbor by a self-propelled vessel. Such transport was merely intended to deliver the Super Scoop to the site so that it could perform its primary purpose, to remove soil so a tunnel could be built connecting roads on land. The incidental movement of the Super Scoop was wholly unconnected with navigational commerce, or movement of men or cargo. Based on these facts, the First Court of Appeals correctly determined the Super Scoop was a special purpose structure involved in a construction project, and was not involved in traditional maritime commerce.

B. *Legal Background*

The Longshore and Harbor Workers' Compensation Act is a workers' compensation statute that applies to employees injured in the course of maritime employment upon the navigable waters of the United States and specifically

excludes from its jurisdiction the master or members of a crew of a vessel. 33 U.S.C. § 901, *et seq*.

C. *Issue*

The central issue in this case is whether the Jones Act or Longshore and the Harbor Workers' Compensation Act will apply to an individual employed on a moored dredge working on a road/tunnel construction project in Boston Harbor. The issues central to this debate have been identified and analyzed by both the lower courts and academics. For the reasons set forth below, LaQuay submits that a moored work platform dredge is a non-vessel because: (1) the special purpose structure (dredge) is constructed to be used primarily (if not solely) as a platform; (2) the dredge is moored, anchored or otherwise secured during all its primary operations; and (3) although the dredge is capable of movement, and is sometimes moved across navigable waters in the course of normal operations, any transportation function is merely incidental to the platform's primary purpose. *See generally* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 227 (West 4th ed. 2004).[2]

III. Summary Argument

In many ways, this case presents a question of first impression to this Court: When is a moored special purpose work platform (dredge) a vessel, if ever? Or, more to the point, given the facts before this Court: When is a working

2. Much has been alleged about the notion that like a ship at sea, equipment was transported as the Super Scoop was moved into place in Boston Harbor. However, there has been little mention of the fact that the Super Scoop cannot and could not be moved without a tow or other assistance (like a bulldozer being moved to a work site).

dredge anything other than a special purpose structure used in construction projects? Courts have traditionally approached this issue as if building a bridge from opposite banks of a river without a possible chance of meeting in the middle. On one side are the Courts that look beyond the functional purpose of the structure and apply a "vessel test" on a case-by-case basis; they ask how is this structure in any way similar to a vessel? Thus begins a convoluted vessel analysis with arbitrary results. On the other side of the river are the Courts that look largely to the primary purpose of the special purpose structure and apply a non-vessel test; they compare the structure to three common attributes of non-vessels. SCHOENBAUM, *supra*, at 227.

Petitioner has urged this Court to apply a vessel test to the facts of this case and further complicate the jurisprudence. In support of its argument, Petitioner has provided several vessel cases from a number of jurisdictions, all of which handle the issue on a case-by-case basis with arbitrary results. Petitioner has effectively asked this Court to broaden an already convoluted definition of a vessel to include everything that floats, boats or totes. Petitioner's request will merely ensure continued litigation and uncertainty when dealing with special purpose structures.

The fact that a moored special purpose work platform (dredge) *touches* water or floats, does not make it a vessel, as alleged by Petitioner. LaQuay requests that, rather than reviewing these facts under the arbitrary vessel analysis, this Court apply the more established and predictable non-vessel test when determining whether a special purpose structure, such as a moored work platform dredge is a vessel.

IV. Argument and Authorities

A. *Attributes of a non-vessel*

Over time, the Courts have evolved an efficient three-prong test that addresses the non-vessel status issue more directly than the complicated and arbitrary analysis urged by Petitioner:

> (1) the structure is constructed to be used primarily as a platform;
>
> (2) the structure is moored or otherwise secured at the time of the accident; and
>
> (3) although the platform is capable of movement and is sometimes moved across navigable waters in the course of normal operations, any transportation function is merely incidental to the platform's primary purpose. SCHOENBAUM, *supra*, at 227; *Kathriner v. UNISEA, Inc.*, 975 F.2d 657 (9th Cir. 1992) (floating fish processing plant not a vessel in navigation); *see also Daniel v. Ergon, Inc.*, 892 F.2d 403, 407 (5th Cir. 1990), citing *Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 831 (5th Cir. 1984) and *Michel v. Total Transp. Inc.*, 957 F.2d 186 (5th Cir. 1992), also following *Bernard*.

This three-part test (hereinafter referred to as the "Schoenbaum Test") is commonly used to determine whether special purpose work platforms are vessels. SCHOENBAUM, *supra*, at 227.[3] LaQuay urges this Court to follow the

3. The issue of non-vessel status is a fact question to be determined on a case-by-case basis. *Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132 (9th Cir. 2002).

equitable path of applying the Schoenbaum Test to these circumstances; such an approach is not only equitable but also prevents this Court from meandering through a complicated, inconsistent vessel analysis, adding or subtracting "vessel points" for lights, bows, sleeping quarters, etc.

B. *Moored work platform dredge is a non-vessel*

The Schoenbaum Test provides for simple analysis that is fair and easy to understand. In this case, there is no question that the Super Scoop is constructed primarily as a platform for the purpose of removing earth from the bottom of the bay in order to build a tunnel connecting two highways. The Super Scoop is moored and secured by a series of anchors and cables that hold it in place during excavation. The Super Scoop is only capable of independent movement by using anchors and cables to pivot along the channel during its excavation, and it is moved only slightly faster than glacial speeds across navigable waters when it is in tow. The fact that it was moved from California to perform its function in Boston is merely incidental to its primary purpose. When applying the Schoenbaum Test above, as opposed to the lengthy, arbitrary vessel test, the Super Scoop and other moored special purpose structures are easily identified as non-vessels.

C. *Petitioner's arguments are not definitive*

A finding of non-vessel status can be made despite Petitioner's red herring arguments regarding captains and crews and navigation systems. Petitioner fails to recognize or even address the fact that road crews are often referred to as crews as are many employment-related groups and that

this title has no bearing on Jones Act seaman status. *See* 46 U.S.C. App. 688(a). Additionally, the fact that the Super Scoop has navigation lights does not make it a vessel. Navigation lights are required on docks, floating barges, and lighthouses. Although the navigation lights required by the Coast Guard on the Super Scoop are important for safety purposes, so are the lights on docks and lighthouses designating the shorelines along any navigable waterway. Petitioner's argument regarding GPS systems is similarly flawed. Cars, trucks, and all means of land-based surveyors now commonly use GPS systems. In this particular case, the Super Scoop's GPS system was in place, not so it could find its way back to California, but so it could maintain its position over the channel being dug for the tunnel.

Application of the Schoenbaum Test to these facts efficiently reveals that the Super Scoop, a moored work platform dredge, is a non-vessel. First, it is undisputed that the structure was used primarily as a work platform involved in a construction project. Second, it is undisputed that the Super Scoop was at all times during its primary function moored by anchors and lines. Finally, the Super Scoop was in place, not capable of motorized self-propelled movement, and any movement was only incidental to dredge work.[4] A finding of non-vessel status based on these facts falls squarely and consistently within the parameters of the Schoenbaum Test.

---

4. A floating casino, a decided self-propelled non-vessel, arguably has more intended movement than does a non-self-propelled dredge. *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 1995 AMC 2038 (5th Cir. 1995).

D. *The Schoenbaum Test should be applied because it yields an efficient, fair, and predictable result*

A moored work platform dredge, such as the Super Scoop, is classified as a special purpose structure. In fact, the court below determined the Super Scoop was very obviously equipment used at a construction site.

The essential issue in this case is not whether the courts or statutes have adequately defined a vessel. Rather, the difficulty is determining whether a special purpose structure is a non-vessel. The Super Scoop is clearly not an ocean liner, crew boat, or a form of traditional maritime transportation. This has resulted in two largely disjunctive tests, both attempting to define a special purpose structure as a vessel or non-vessel.

As a special purpose structure, the Super Scoop easily falls within the parameters of the Schoenbaum Test as a non-vessel, and this Court may readily compare the Super Scoop dredge to similar work equipment. An easy comparison would be that of the Super Scoop dredge to a bulldozer or crane. A moored work platform dredge operates less like a ship at sea than like a bulldozer or crane that must be transported to a work site. The Super Scoop is certainly important to maritime commerce, but it has more in common with the machinery used to dredge and/or build the Suez Canal than it has in common with a ship transporting cargo or personnel. It is a device commonly used for construction, operating like a crane resting on the water rather than wheels. Like many special purpose structures, its function is primarily to serve as a work platform on which men and equipment can excavate earth or drill wells beneath them.

By employing the Schoenbaum Test, this Court will ensure other courts avoid the arbitrary nature of the vessel test, which requires a court to randomly determine whether a special purpose structure is a vessel, relying on the local prejudices of juries on a case-by-case basis. For example, the Ninth Circuit has held that so many factors go into determining what is a vessel that the issue must be left to the trier of fact on a case-by-case basis. *Martinez v. Signature Seafood, Inc.*, 303 F.3d 1132 (9th Cir. 2002). The ever-growing list of vessel factors is the harbinger of its arbitrary result. Should this Court look beyond the Schoenbaum Test and, instead, deem the Super Scoop a vessel despite its functional purpose, it would only be adding to previous inconsistent rulings. By applying the Schoenbaum Test, this Court will prevent future arbitrary results by directing other courts to determine whether a special purpose structure is a non-vessel based on its construction and functional purpose.

The arbitrary nature of Petitioner's argument is illuminated by the work performed in oil and gas development in a marine environment. It should be noted that the Jones Act and the Longshore and Harbor Workers' Compensation Act are both federal workers' compensation statutes. When Congress adopted the Longshore and Harbor Workers' Compensation Act for individuals working on the Outer Continental Shelf, Congress intended to provide coverage to workers on the Outer Continental Shelf involved in mineral development. 43 U.S.C. § 1331, *et seq*.

However, as a result of the theories argued by Petitioner, men involved in similar or same work on the Outer Continental Shelf, have been faced with uncertainty and double standards. For example, a stationary platform on the Outer Continental Shelf is not a vessel; but a "tender" moored to that platform solely to provide living facilities for workers and supplies for

the same stationary platform *is* a vessel. *Golden v. Rowan Cos., Inc.*, 778 F.2d 1022 (5th Cir. 1985). Essentially, two special purpose structures moored to each other and to the soil, involved in the same project, with the same perils, and possibly the same employer could arbitrarily provide different recoveries.

Like a bridge built from two sides of the river, there really is no possible meeting in the middle. The clear and fair answer is to adopt the Schoenbaum Test for all special purpose platforms.

V. Conclusion

This Court has a simple option in its review of this case: (1) apply an arbitrary vessel analysis dependent upon the prejudice of the fact-finder, which considers limitless fact scenarios to analyze special purpose structures; or (2) apply the Schoenbaum Test to fairly determine that special purpose platforms like the Super Scoop are not vessels. LaQuay urges this Court to follow the more reasonable and equitable Schoenbaum Test and deem special purpose work platforms to be non-vessels.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In The Supreme Court of the United States

WILLARD STEWART,

Petitioner,

v.

DUTRA CONSTRUCTION CO.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

To qualify for "seaman" status under the Jones Act, a worker must have an "employment-related connection to a vessel in navigation." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 357 (1995). What is the legal standard for determining whether a special purpose watercraft (such as a dredge) is a Jones Act "vessel?"

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INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is filed, with the consent of the parties, on behalf of the United Brotherhood of Carpenters and Joiners of America ("UBCJA").[1] The UBCJA is an international labor organization with affiliates in the United States and Canada. It enjoys a total membership of more than 531,000 working men and women. Many of those men and women are employed upon the navigable waters of the United States as commercial divers, diver tenders, pile drivers, carpenters, riggers, and welders. They build, repair and demolish piers, wharves, bridges, oil platforms, submarine pipelines, underwater transit tubes, and open ocean sewer outfalls. They typically perform these tasks from the decks of crane ships, drilling ships, tug boats, dive boats, derrick barges, spud barges, dredges, mud scows, jack-up rigs, work-over rigs and other special purpose watercraft. Such work often invests the people who perform it with seaman status under the Jones Act. 46 U.S.C.A. § 688. That status, in turn, gives many UBCJA members access to a "trilogy of heightened legal protections."[2] The UBCJA is interested in this case because the Court's decision will affect its members' rights to claim these protections.

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[1] This brief was prepared on behalf of the UBCJA by its undersigned counsel. It was not authored, in whole or in part, by counsel for any party. No person or entity other than the UBCJA, or its counsel, made a monetary contribution to the preparation or submission of the brief.

[2] Often called the "seaman's remedial trident," these remedies include the rights to sue for Jones Act negligence, unseaworthiness and maintenance, cure and found. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1997).

SUMMARY OF ARGUMENT

Dredge hands have always been treated as seamen by the maritime law[3] and dredges have always been treated as vessels.[4] We cannot find a single reported case holding that a dredge is not a vessel – except for the decision below.[5] That decision is based on the First Circuit's ruling

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[3] *See, e.g., Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957); *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143 (3d Cir. 1998); *Williams v. Western Pacific Dredging Co.*, 441 F.2d 65 (9th Cir. 1971); *Gahagan Const. Corp. v. Aramao*, 165 F.2d 301 (2nd Cir. 1948); *Ramos v. Universal Dredging Corp.*, 547 F.Supp. 661 (D.C. Ha. 1982); *Melanson v. Bay State Dredging & Contracting Co.*, 62 F.Supp. 482 (D.C. Mass. 1945). As the Fourth Circuit explained more than 100 years ago, when it upheld seaman's rights for a Virginia dredge hand in *Saylor v. Taylor*, 77 F. 476, 479 (4th Cir. 1896), "in all times and in all countries those who are employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight, to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners, 'no matter what may be their sex, character, station or profession.'" *Id.*

[4] The first reported case to treat a dredge as a vessel under maritime law was *The Pioneer*, 30 F. 206, 207 (E.D.N.Y. 1886). By 1930, so many courts had followed suit, the Fourth Circuit could correctly note that the vessel status of dredges "is sustained by the overwhelming weight of authority." *Butler v. Ellis*, 45 F.2d 951, 955 (4th Cir. 1930).

[5] In a recent A.L.R. Annotation entitled *Applicability of Jones Act (46 U.S.C. § 688) to Workers Connected with Operation of Dredges, Drilling Platforms, Derricks, or Similar Special-Purpose Equipment*, 92 A.L.R. Fed. 733 (1989 & 2004 Supp.), the author, John R. Wagner, Jr., cites many published opinions treating dredges as Jones Act vessels, *see id.* at § 3(a), and seven that do not. *Id.* at § 3(b). One of those seven is the decision below. But a close examination of the other six shows that Mr. Wagner is misreading them. Many, if not all of these cases, are no longer good law. Most of them turned on jurisdictional issues, but not one them on vessel status.

The first of Mr. Wagner's cases, *Fuentes v. Gulf Coast Dredging Co.*, 54 F.2d 69 (5th Cir. 1931), involved a plaintiff who was hurt working on a dredge that lay partially aground at the end of a channel it had dug

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off Galveston Bay. The district court denied his Jones Act claim on the merits, and the Fifth Circuit affirmed, ruling *sua sponte* that the district court had lacked subject matter jurisdiction because the tort had occurred on a dredge doing landfill work in marginally navigable water. *But see O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 39 (1943) (holding that the Jones Act covers any injury that occurs in the course of a seaman's employment and not just those that occur afloat). Assuming *arguendo* that *Fuentes* was sound, it did not hold, state, or even fairly imply that the dredge was not a vessel.

Woods v. Merrill-Stevens Dry Dock & Repair Co., 14 F.Supp. 208, 209-10 (S.D.Fla. 1936) expressly followed *Fuentes* in holding that dredge work at a shipyard was too "purely local" to fall under the federal courts' admiralty jurisdiction. It did not consider vessel status either.

Stanfield v. Shellmaker, Inc., 869 F.2d 521 (9th Cir. 1989) upheld the district court's denial of Jones Act damages to a plaintiff who had been injured aboard a dredge that was deepening a land-locked, irrigation channel lying wholly within the State of California. The decision was handed down six years before this Court's lodestar decision in *Chandris*, and concluded that the land-locked situs of the project in question precluded a finding of seaman status at the time of injury, even though the plaintiff had been employed by the defendant for a number of years, aboard several different dredges, on a variety of other projects, all of which had occurred on navigable waters, because the "fleet seaman doctrine" neither obtained in the Ninth Circuit nor encompassed an injury "arising from service to a *vessel* in non-navigable waters." 869 F.2d at 525 (emphasis added); *but see Chandris*, 515 U.S. at 363 (holding that courts should not employ "a 'snapshot' test for seaman status, inspecting only the situation as it exists at the instant of injury"). There is thus nothing in the decision to suggest that a dredge is not a vessel.

The watercraft involved in *Hurst v. Pilings & Structures, Inc.*, 896 F.2d 504 (11th Cir. 1990), was not a dredge at all but "a spud barge" being used as a commercial diving platform. *But see Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344, 351 (5th Cir. 1998) (holding that "special purpose craft such as submersible drilling rigs, jack-up rigs, and *spud barges* remain stationary while performing work, yet retain their vessel status.") (emphasis added).

The court in *Beddoo v. Smoot Sand & Gravel Corp.*, 128 F.2d 608, 610 (CA D.C. 1942), excluded the plaintiff dredgerman from Jones Act

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in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992) (*en banc*), and is manifestly erroneous. Rather than belabor it any further, or dwell on the particular status of the *Super Scoop,* we have attached a Chronological Table cataloguing the long and hitherto unbroken line of cases holding or assuming that a dredge is a vessel. *Appendix A hereto.* We will devote the remainder of this brief to the much broader, and far more important question posed by the Petition for *Certiorari*: What is the legal standard for determining whether a special purpose watercraft is a vessel?

Congress and the circuit courts have offered different answers to that question. The Congressional standard is codified in the Rules of Construction Act. 1 U.S.C. §§ 1 *et seq.*; 61 Stat. 633, ch. 388. Those rules were adopted to assist "in determining the meaning of any Act of Congress," 1 U.S.C. § 1, and provide that: "The term 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. This is not only the

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coverage on the view – later "jettison[ed]" by this Court in *McDermott, Int. v. Wilander*, 498 U.S. 331, 353 (1991) – that a seaman's duties must "pertain to navigation". Although it expressed doubt about the proposition that mining sand from a navigable river bank should be considered maritime, 128 F.2d at 610; *but see Grubart v. Great Lakes Dredge & Dock*, 513 U.S. 527, 540 (1995) (" 'There are many cases holding that a dredge, or a barge with a pile driver, employed on navigable waters is subject to maritime jurisdiction . . .' "), the *Beddoo* decision never questioned the vessel status of the dredge involved.

The decision in *Covington v. Standard Dredging Corp.*, 61 So.2d 644, 645 (Fla. 1952), refers to a dredge doing landfill work as a "vessel" while excluding the worker from seaman status on the same mistaken ground as *Beddoo, supra.*

"most widely used" definition of the term, 1 Schoenbaum, *Admiralty & Maritime Law* § 6-9 (4th ed. 2003), it has already been utilized by this Court in a variety of contexts.[6] Since "[m]aritime tort law is dominated by statute," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990), the UBCJA agrees with Petitioner Stewart that 1 U.S.C. § 3 supplies the best legal standard for determining the vessel status of special purpose watercraft under the Jones Act.

Lower courts continued to use 1 U.S.C. § 3 for determining Jones Act vessel status right into the 1980's.[7] Since that section merely requires that a vessel be "*practically* capable of being used as a means of transportation", *Evansville*, 271 U.S. at 19 (emphasis added), experienced admiralty courts like the Fifth Circuit left Jones Act status open to a whole armada of "special purpose structures not usually employed as a means of transportation" and entrusted close cases to the jury. *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).[8] As Judge Wisdom's landmark decision in *Offshore* summed up:

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[6] *See Norton v. Warner Co.*, 321 U.S. 565, 571 n. 4 (1944); *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19 (1926); *Ellis v. United States*, 206 U.S. 246 (1907); *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625 (1885).

[7] *See, e.g., Burks v. American River Transp. Co.*, 679 F.2d 69, 75 (5th Cir. 1982) (river barge); *Brinegar v. San Ore Constr. Co.*, 302 F.Supp. 630 (E.D.Ark. 1969) (dredge); *Early v. American Dredging Co.*, 101 F.Supp. 393 (E.D.Pa. 1951) (dredge); *Gahagan Const. Corp. v. Armao*, 165 F.2d 301 (1st Cir. 1948) (dredge); *Maryland Cas. Co. v. Lawson*, 94 F.2d 190 (5th Cir. 1938) (dredge); *Kibadeaux v. Standard Dredging Co.*, 81 F.2d 670 (5th Cir. 1936) (dredge); *George Leary Const. Co. v. Matson*, 272 F. 461 (4th Cir. 1921) (pile driver scow).

[8] *See also Blanchard v. Engine & Gas Compressor Services, Inc.*, 575 F.2d 1140, 1142 (5th Cir. 1978); *Hicks v. Ocean Drilling and*

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> Attempts to fix unvarying meanings having a firm legal significance to such terms as 'seaman,' 'vessel,' 'member of the crew' must come to grief on the facts. These terms have such a wide range of meaning, under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application under the circumstances of a particular case. Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial court cannot state an unvarying rule of law that fits the facts.

266 F.2d at 779-80.

This Court expressly approved *Offshore* in 1991 when it "jettisoned" the requirement that a Jones Act plaintiff be aboard "primarily to aid in navigation," and made all those who "'contribut[e] to the function of the vessel or to the accomplishment of its mission'" eligible for seaman status. *Wilander, supra,* 498 U.S. at 354-55 *quoting Robison,* 266 F.2d at 779. By then, however, some of the lower courts had forgotten Judge Wisdom's teaching. Beginning with *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1001-02 (5th Cir. 1973), even the Fifth Circuit started deciding close cases as a matter of law because of a subtle distinction it had come to perceive between watercraft that were "designed or used primarily for the transportation of passengers, equipment and cargo," and those whose transportation function was only "incidental." *Bernard v.*

Exploration Co., 512 F.2d 817 (5th Cir. 1975), *cert denied*, 423 U.S. 1050 (1976).

Binnings Constr. Co., 741 F.2d 824, 828-29 (5th Cir. 1984). This distinction gradually swamped the broad language in 1 U.S.C. § 3, and led first to the so-called "floating work platform" doctrine espoused to varying degrees by the Fifth, Eleventh and Second Circuits,[9] and ultimately to the First Circuit's radical departure in *DiGiovanni*.[10] According to *DiGiovanni*, and the decision below, "if a barge, or other float's 'purpose or primary business is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit." 959 F.2d at 1123 (original emphasis). This capricious rule builds on *Bernard* and the work platform doctrine, *id.*, and permits maritime workers like Petitioner Stewart to oscillate in and out of Jones Act coverage in the course of their regular duties.

But as the Fifth Circuit eventually concluded in *Manuel v. P.A.W. Drilling Well Service, Inc.*, 135 F.3d 344, 347-50 (5th Cir. 1998),[11] the work platform doctrine was

[9] *See, e.g., Ellender v. Kiva Constr. & Eng'g, Inc.*, 909 F.2d 803 (5th Cir. 1990); *Hurst v. Pilings & Structures*, 896 F.2d 504 (11th Cir. 1990); *Tonnensen v. Yonkers Contracting Co.*, 82 F.3d 30 (2nd Cir. 1996).

[10] *DiGiovanni*, 959 F.2d at 1123 (original emphasis). This rule is even more restrictive than the work platform doctrine, 959 F.2d at 1128 (Torruella, J., dissenting), and has been adopted by both the Sixth Circuit, *Hatch v. Durocher Dock & Dredge, Inc.*, 33 F.3d 545, 547-48 (6th Cir. 1994), and the California Court of Appeal. *See, Spears v. Kajima Eng. & Const. Co.*, 101 Cal.App.4th 466, 475, 124 Cal.Rptr.2d 97 (2002); *Gault v. Modern Continental/Roadway Const. Co., Inc. J.V.*, 100 Cal.App.4th 991, 1005, 123 Cal. Rptr. 2d 85 (2002). It is also the basis for the decision below. *Stewart v. Dutra Const. Co., Inc. ("Stewart I")*, 230 F.3d 461, 467 (1st Cir. 2000), *Pet. App. B*, 22.

[11] The plaintiff in *Manuel* was an oil field hand injured aboard a spud barge anchored over an abandoned well head. The trial court had relied on the work platform doctrine to dismiss his Jones Act claims on

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formulated during the 1980's, before this Court's decision in *Wilander*, and more specifically, before this Court had affirmed the putative seaman status of a San Diego shipyard worker injured aboard "a floating work platform" in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991). For its part, *DiGiovanni* was decided in 1992, three years before this Court handed down *Chandris*. Between them, *Wilander, Gizoni*, and *Chandris* resurrected Judge Wisdom's opinion in *Offshore, see, Wilander*, 498 U.S. at 353, emphasized that it is the plaintiff's connection to a vessel and not his or her particular job that is determinative, *Gizoni*, 502 U.S. at 88, rejected a "snapshot" or "moment of the injury" test in favor of a scrolling inquiry assessing the "total circumstances" of the plaintiff's overall employment, *Chandris,* 515 U.S. at 363, and handed down the "essential requirements" for seaman status:

> "First . . . an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission. . . .
>
> Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of

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the ground that his spud barge was not a vessel. The Fifth Circuit reversed and questioned the continued vitality of the work platform doctrine after noting that "many of our work platform cases were decided before the Supreme Court's decision in *Southwest Marine, Inc. v. Gizoni*, where the Court concluded that genuine issues of material fact existed 'regarding whether the floating platforms [upon which plaintiff Gizoni had worked] were vessels in navigation.'" *Id.* at 350, n. 8 (*quoting Gizoni*, 502 U.S. at 92). As the decision observed, "special purpose craft such as submersible drilling barges, jack-up rigs, and spud barges remain stationary while performing work, yet retain their vessel status." *Id.* at 351.

> such vessels) that is substantial in terms of both its duration and its nature.'" *Id.* at 368.

In retrospect, it is obvious that both *DiGiovanni* and the work platform doctrine were fledgling, unsuccessful, and in the end unnecessary attempts to restrict Jones Act coverage to sea-based workers who "'face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.'" 959 F.2d at 1122 *quoting Wilander,* 498 U.S. at 354. Now that this Court has handed down the substantial connection requirement to accomplish this very same goal, *Chandris,* 515 U.S. at 368, there is no longer any need for such restrictive vessel definitions. Many lower courts recognized, from the outset, that there never was.

Unlike the courts following *DiGiovanni*, or the work platform doctrine, the Ninth Circuit holds "that unusual-looking craft whose purpose is not the transportation of persons or things can be considered vessels under the Jones Act." *Southwest Marine, Inc. v. Gizoni ("Gizoni II")*, 56 F.3d 1139, 1140, n. 1 (9th Cir. 1995). That Circuit still leaves close questions to a jury, *Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132, 1136-37 (9th Cir. 2002), and only denies vessel status to watercraft that have no transportation function of any kind. *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 660-61 (9th Cir. 1992). The Third, Fourth and Seventh Circuits have taken a similar tack.[12]

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[12] *See, e.g., Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984). ("Any floating structure, including those designed for special purposes, is a 'vessel' . . . so long as the structure at some time serves as a means of transportation on water."); *Hill v. Diamond*, 311 F.2d 789, 791 (4th Cir. 1962) ("It is well established that many special purpose craft, such as dredges, floating derricks and

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This ecumenical approach to vessel status not only fits the doctrinal framework established in *Wilander* and *Chandris* by leaving the winnowing process to the substantial connection requirement, it preserves the uniformity of maritime law by conforming to the statutory rule of construction codified in 1 U.S.C. § 3. It also sidesteps the vague distinction between a watercraft's "primary" and "incidental" purposes and holds to the course set in *Chandris* by eschewing "the temptation to create detailed tests to effectuate the congressional purpose, tests that tend to become ends in and of themselves." 520 U.S. at 369. We respectfully submit that none of the special purpose vessel standards on which Dutra and its *amici* will rely can claim any of these advantages. For these reasons, the UBCJA supports Petitioner's reliance on 1 U.S.C. § 3.

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barges equipped for special purposes or operations are vessels within the meaning of the Jones Act[.]"); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 37 (3rd Cir. 1975) (upholding Jones Act vessel status for a dumb barge because "the Supreme Court has extended that remedy so as to permit claims brought for injuries incurred in the construction of a "Texas Tower," *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958), and an off-shore oil rig, *Gianfala v. Texas Co.*, 350 U.S. 879 (1955).").

ARGUMENT

I. JONES ACT JURISPRUDENCE NEEDS A UNIFORM VESSEL DEFINITION

A. 33 U.S.C. § 902(3)(G) makes an employment related connection to a vessel *the* essential element of seaman status.

Although the Jones Act neither uses nor defines the term "vessel," the LHWCA does.[13] That statute specifically excludes "a master or a member of a crew of any vessel" from its protection. 33 U.S.C. § 902(3)(G). Since that phrase was designed to bar Jones Act beneficiaries from LHWCA benefits, it is not only synonymous with the term "seaman," it codifies "the key requirement for Jones Act coverage[.]" *Wilander,* 498 U.S. at 347; *Swanson v. Marra Bros., Inc.,* 328 U.S. 1, 6-7 (1946). It is therefore thoroughly settled that a Jones Act plaintiff must have an "employment-related connection to a vessel in navigation." *Chandris,* 515 U.S. at 357. Defining the term "vessel" thus remains the last, "pivotal issue" in this labyrinthine corner of the law. *See, Stewart I,* 230 F.3d at 466, *Pet. App. B,* 21.[14]

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[13] Unfortunately, the circular vessel definition set forth in the LHWCA sheds no light on the seaman status question. According to that definition, "the term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." 33 U.S.C. § 902(21).

[14] This Court handed down four Jones Act decisions between 1990 and 1997. *Wilander, supra*; *Gizoni, supra, Chandris, supra*; *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997). But those cases did not present an opportunity to address the question of vessel status. *See gen.*

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B. The lower courts have not been able to agree on a vessel definition.

The lower courts have developed a gaggle of conflicting vessel definitions.[15] The only point on which they seem to agree is their unanimous assertion that: "The LHWCA definition of 'vessel' is significantly more inclusive than that under the Jones Act." *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 607 (1st Cir. 1996) (*en banc*).[16] While the cases that make this assertion are not construing the crew member exclusion in § 902(3)(G), but the third party liability provisions in § 905(b),[17] the notion that the word "vessel" means one thing in the former and another in the latter offends the "presumption that a given term is used to mean the same thing throughout a statute." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Because most lower courts employ the rule of construction in 1 U.S.C. § 3 to determine whether a floating structure is a "vessel" under LHWCA § 905(b), *Morehead, supra*,[18] and since this Court

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John R. Hillsman, *Still Lost in the Labyrinth: The Continuing Puzzle of Seaman Status*, 15 U.S.F. Mar. L.J. 49, 54 (2003).

[15] *See* Petition for Certiorari, § I.

[16] *See also Stewart v. Dutra Const. Co. ("Stewart II")*, 343 F.3d 10, 13 (1st Cir. 2003), *Pet. App. A*, 5; *Kathriner*, 975 F.3d at 662; *DiGiovanni v. Traylor Bros. ("DiGiovanni III")*, 97 F.3d 624 (1st Cir. 1996); *McCarthy v. Bark Peking*, 716 F.2d 130, 133-34, n. 3 (1st Cir. 1983); *Sala v. Gates Constr. Corp.*, 868 F.Supp. 474, 479 (E.D.N.Y. 1994); *DiGiovanni v. Traylor Bros. ("DiGiovanni II")*, 830 F.Supp. 106, 108-109 (D.R.I. 1993).

[17] That section permits LHWCA beneficiaries to seek third party tort damages for injuries caused by "the negligence of a vessel[.]" 33 U.S.C. § 905(b); *see gen. Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

[18] *See also McCarthy*, 716 F.2d at 33-34; *Kathriner*, 975 F.2d at 662; *DiGiovanni II*, 830 F.Supp. at 108-109.

has already used that same section to interpret LHWCA § 902(3)(G), *Norton*, 321 U.S. at 571 n. 4, it is difficult to understand why that rule should not be universally applied.

II. 1 U.S.C. § 3 PROVIDES THE ONLY WORKABLE STANDARD FOR DETERMINING SPECIAL PURPOSE VESSEL STATUS.

A. Until recently, the admiralty had always accommodated special purpose vessels.

As this Court recognized in *Wilander*, the purposes for which vessels are employed upon the waters are "myriad." 498 U.S. at 344. The maritime law was therefore evolving to accommodate unconventional watercraft long before Judge Wisdom articulated his version of the special purpose doctrine in *Robison*. As the Fourth Circuit observed in *Saylor v. Taylor*[19] back in 1896, "so far-reaching are the principles which underlie the jurisdiction of the courts of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world." 77 F. at 479.[20] This has "enabled the law to develop naturally along with the development of unconventional vessels[.]" *Offshore*, 266 F.2d at 780. The rule of construction codified in 1 U.S.C. § 3 can be seen as a reflection of that long standing policy. *See*, Steven F.

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[19] *See* footnote 3 *supra*.

[20] *See also* Hon. W. Eugene Davis, *The Role of Federal Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower Federal Courts*, 75 Tul. L. Rev. 1355, 1375 (2001); E. Benedict, *American Admiralty Law* § 241 (1850).

Friedell, 1 *Benedict on Admiralty* § 165 (7th ed. 1958 & 2003 supp.). The relatively recent efforts of some lower courts to curtail the admiralty's traditional accommodation of special purpose vessels represents a sea change in the law. *DiGiovanni* and the floating work platform doctrine are symptomatic of this change.

B. Attempts to exclude special purpose vessels under the work platform doctrine have proven prolix and unpredictable.

The floating work platform doctrine rests on three "non-requisite criteria" and nine free-floating "factors," and purports to deny Jones Act vessel status to any watercraft that is not used *primarily* for transportation. *Ellender*, 909 F.2d at 806. The "non-requisite criteria" inquire whether the craft at issue was (a) constructed and used primarily as a work platform rather than for transporting people or things, (b) moored or otherwise secured at the time of the accident, and (c) capable of anything other than a "merely incidental" transportation function. *See Bernard, supra*, 741 at 831-832. The free floating factors ask if it had (1) navigational aids, (2) a raked bow, (3) lifeboats or other life-saving equipment, (4) bilge pumps, (5) crew quarters, (6) Coast Guard registration/, (7) the ability to float, (8) the ability to move, and (9) a recent history of movement. *Id*. These factors and criteria frame the very type of "detailed," self-executing tests that this Court eschewed in *Chandris*. 520 U.S. at 369. Just how the Fifth Circuit culled them from the countless, seamless features that centuries of art, technology and

tradition have built into the ever-evolving concept of a "vessel"[21] has never been adequately explained.

As we saw earlier, the work platform doctrine is generally thought to have been launched by *Cook v. Belden Concrete Products, Inc., supra*. *See Bernard,* 741 F.2d at 829. *Cook* involved a barge constructing platform, not unlike a building way, that was functionally identical to the floating dry dock this Court refused to term a "vessel" in *Cope v. Valette Dry Dock Co.,* 119 U.S. 625 (1887). In other words, the building way in *Cook* was merely "an extension of land." *See Manuel,* 135 F.3d at 350 (explaining *Cook*). There was thus nothing about the case that should have scuttled the Jones Act status of special purpose barges and dredges generally. As Judge Clark's opinion in *Cook* was careful to observe: "Conventional ships and barges as well as unconventional craft such as submersible drilling barges and floating dredges which are designed for navigation and commerce are vessels within general maritime and Jones Act jurisdiction and retain such status even while moored, dry-docked, or otherwise immobilized and secured to land." 472 F.2d at 1001 (numerous citations omitted).

Quite apart from its questionable provenance, the floating work platform doctrine is impractical and unwieldy. First of all, it turns on the abstract and often subjective[22] distinction between a watercraft's "primary"

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[21] The word "vessel" apparently comes to us from the Old French "*vaissel*" or "*vaisseau.*" John G. Rogers, *Origins of Sea Terms* (4th ed., Mystic Seaport Museum, 1985) 189.

[22] All too often, this involves inferring or devining the "intention of the owner." *See, e.g., Manuel,* 135 F.3d at 350.

and "incidental" purposes. But as one insightful district court observed:

> Not all floating structures which serve as work platforms are excluded from vessel status. Aircraft carriers, fishing boats, cable-laying boats, for example, are work platforms in a very real sense. Yet no one would dispute their status as vessels. What distinguishes these vessels from the work platforms in *Davis* [*v. Cargill*, 808 F.2d 361 (5th Cir. 1986) (following *Bernard*)] is that the former move people or equipment across water to the place where the work will be performed, while the latter are affixed close to the shoreline so that work may be brought to them.

Koernschild v. W.H. Streit, 834 F.Supp. 711, 717 (D.N.J. 1994) (holding that anchored "flexifloat" could be vessel). Because of the doctrine's self executing nature, however, only a few work platform cases seem to recognize this distinction. *See, e.g., Sharp v. Johnson Bros. Co.*, 917 F.2d 886 (5th Cir. 1990) (where Fifth Circuit reversed a summary dismissal entered under the work platform doctrine and held that a pile driving spud barge could be a vessel because it transported its crane and pile driving equipment to the construction site).

The multifaceted work platform test has also been criticized as "prolix," "arbitrary," and "extremely flabby." *See* Robertson, *The Law of Seaman Status Clarified*, 23 J.Mar.&Com. 1 (1992) at 14-15; 1 Schoenbaum, *supra*. That may be why the Fifth Circuit seized the opportunity to reconsider it in *Manuel v. P.A.W. Drilling Well Service,*

Inc., 135 F.3d at 347-51.[23] This reconsideration included the realization "that a vessel can serve the dual function of transporting cargo, equipment, or persons across navigable waters and acting as a work platform." *Id.* at 351. Congress must have recognized the same thing when it refused to speculate about a vessel's primary and incidental uses and defined the term to include "every description of water craft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water." 1 U.S.C. § 3 (emphasis added). That definition is much easier to apply, and produces far more predictable results,[24] than the floating work platform doctrine.

C. Attempts to exclude special purpose watercraft under the "actual navigation test" articulated in *DiGiovanni* run afoul of *Chandris*.

While the actual transit test employed by *DiGiovanni* was extrapolated largely from the Fifth Circuit's decision

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[23] *See* footnote 17 *supra*.

[24] For an examination of the unpredictable results produced by the work platform doctrine, *see* The *Amicus Curiae* Brief of the Association of Trial Lawyers of America in Support of the Petition, § IV. That Brief cites the notoriously irreconcilable results in *Sharp, supra* (where the Fifth Circuit reversed a summary judgment and held that a pile driving spud barge could be a vessel) and *Ellender, supra* (where the same circuit affirmed a summary judgment and held that a pile driving spud barge could not be a vessel). It also compares *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d at 351 (noting that "special purpose craft such as submersible drilling barges, jack-up rigs, and spud barges remain stationary while performing work, yet retain their vessel status") to *Hurst v. Pilings & Structures, Inc.*, 896 F.2d at 504 (holding that a spud barge was a work platform, and not a vessel, as a matter of law).

in *Bernard,* its lineage can also be traced back to *Cook*. As we saw, *Cook* was "governed by the proposition that, 'as a matter of law, a floating dry dock is not a vessel *when it is moored and in use as a dry dock.*'" 472 F.2d at 1002 (original emphasis) (citations omitted). The opinion nonetheless suggested that: "Although the floating construction platform was not designed for the purpose of navigation, the structure might be classified as a vessel subject to the liabilities arising from an allegedly unseaworthy condition, if at the time of appellant's injury it had actually been engaged in navigation." *Id. DiGiovanni* turned this suggestion into law.

DiGiovanni and the decision below hold that "if a barge, or other float's primary 'purpose is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit" *DiGiovanni,* 959 F.2d at 1123 (original emphasis); *Stewart I,* 230 F.3d at 467, *Pet. App. B,* 22. But that holding cannot be reconciled with this Court's opinions in *Chandris* or *Harbor Tug.*[25] Under those opinions, a plaintiff's Jones Act status must be determined, not from a fleeting "snapshot" of his duties at the

[25] Nor can they be squared with *Senko v. LaCrosse Dredging Corp.,* 352 U.S. 370, 371 (1957) (which upheld seaman status for an Illinois dredge hand injured in the service of "a stationary earth removing machine"); *Grubart v. Great Lakes Dredge & Dock,* 513 U.S. 527, 535 (1995) (where this Court observed that no one could "seriously dispute the conclusion of each court below" that a spud barge is a "vessel for maritime tort purposes" even "though the barge was fastened to the river bottom and was in use as a work platform at the times in question") and *Gizoni,* 502 U.S. at 83-84 (where this Court held that a shipyard worker could be a seaman even though he was injured aboard a floating work platform that was moored to a dry dock.)

moment of injury, but "'in the context of his entire employment' with his current employer." *Chandris,* 515 U.S. at 366; *Harbor Tug,* 520 U.S. at 558 (1997). The idea is "to avoid engrafting upon the statutory classification of a 'seaman' a judicial gloss so protean, elusive, or arbitrary as to permit a worker to walk into and out of coverage in the course of his regular duties." *Chandris,* 515 U.S. at 363. By permitting special purpose watercraft to carry their crews in and out of seaman status every time they weigh or drop an anchor, *DiGiovanni* and the decision below varnished the Jones Act with just such a protean gloss.

This gloss evidently flowed from the First Circuit's desire to separate land-based workers from sea-based workers by means of a restrictive vessel definition. *See DiGiovanni,* 959 F.2d at 1122. Though the authors of the work platform doctrine never stated their intentions as clearly as the First Circuit did in *DiGiovanni,* they were probably inspired by the same goal. *Bernard,* 741 F.2d at 828-29. But that goal was mooted by this Court's *Chandris* decision.

III. *CHANDRIS* AND THE SUBSTANTIAL CONNECTION REQUIREMENT HAVE MOOTED THE NEED TO EXCLUDE SPECIAL PURPOSE VESSELS.

A. This Court restated the elements of seaman status in *Chandris.*

Chandris was decided in 1995, three years after *DiGiovanni* and more than a decade after *Bernard.* It restated the theretofore tangled jurisprudence of seaman status as follows:

> [T]he employment-related connection to a vessel in navigation necessary to qualify as a seaman under the Jones Act comprises two basic elements: The worker's duties must contribute to the function of the vessel or the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature.

515 U.S. at 376 (internal quotation marks and citation omitted). Lower courts have broken down these two basic elements still further:

> A seaman is any worker who faces "regular exposure to the perils of the sea." A worker faces regular exposure to the perils of the sea if (1) his duties contributed to the function of a vessel or to the accomplishment of its mission; (2) he has a connection to a vessel (or to an identifiable group of such vessels) that is substantial in duration; (3) he has a connection to a vessel (or to an identifiable group of such vessels) that is substantial in nature; and (4) the relevant vessel (or group of vessels) is in navigation.

Lorimer v. Great Lake Dredge & Dock Co., 2002 U.S.App.LEXIS 10775, p. 3 (9th Cir. 2002) (citations omitted) (unpublished); *see also Gault v. Modern Continental/Roadway Constr. Co.*, 100 Cal.App.4th at 998-99. Each of those four elements helps to define the term "seaman."

B. Some of the elements restated in *Chandris* were designed to be inclusive.

The Jones Act has always been "entitled to a liberal construction to accomplish its beneficent purposes."

Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 790 (1949). Some of the elements of seaman status were therefore designed to be expansive. Element number (1), for example, the requirement that a seaman's duties "contribute to the function" of his or her vessel, "is very broad," *Chandris*, 515 U.S. at 368, and extends Jones Act coverage to anyone who perform ship's work. *Wilander*, 498 U.S. at 354-55. Element number (4), the requirement that the relevant vessel or group of vessels be "in navigation," is also very expansive and reaches any seaman who serves aboard any operating watercraft even when "'she is not voyaging, but is at anchor, berthed or dockside.'" *Chandris*, 515 U.S. at 373.[26] The only requirement that was designed to be restrictive is the so-called "substantial connection requirement" set forth in elements (2) and (3).

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[26] The phrase "in navigation" is thus "used in its broad sense and is not confined strictly to the actual navigating or movement of the vessel." *Johnson*, 742 F.2d at 1063; *see generally* Edwin J. Bull, *Seaman Status Revisited: A Practical Guide to Status Determination*, 6 U.S.F.Mar.L.J. 547, 582-84 (1994). A vessel is "in navigation if it is engaged in its expected duties on navigable waters." *Leonard v. Transoceanic Sedco Forex*, 189 F.Supp.2d 627, 629 (S.D. Tx. 2002). The distinction is between a "dead ship" and an operational one. *See Chandris*, 515 U.S. at 372-76. While a ship in mothballs is "out of navigation" even when it's being towed across the Atlantic, *see West v. United States*, 361 U.S. 118, 123-24 (1959), and an unfinished ship has not yet "entered navigation" even though it has already voyaged from New Orleans to Tacoma, *see McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 568 (9th Cir. 1992), an operating vessel with a crew aboard remains "in navigation" even when it is sitting in dry dock. *See, Chandris*, 515 U.S. 347; *Cook*, 472 F.2d at 1001-02; *see also* David W. Robertson, *Continuing Issues in the Rights of Injured Maritime Workers in the Wilander-Gizoni Era*, 24 Rutgers L.J. 443, 464 (1993), John R. Hillsman, *supra*, 15 U.S.F.Mar.L.J. at 66-70.

C. The principal restrictions on seaman status were restated in *Chandris* as the substantial connection requirement.

"The fundamental purpose of the substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and whose employment does not regularly expose them to the perils of the sea." *Chandris, supra,* 515 U.S. at 368. There are two elements to this requirement; the first is temporal: "A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are." *Id.* at 371. According to one well settled rule of thumb: "A worker who spends less than 30 percent of his time in the service of a vessel should not qualify as a seaman under the Jones Act." *Id.* at 371.

The other element focuses on the job-related hazards that a putative seaman faces. As this Court put it *obiter dicta* in *Harbor Tug,* "the inquiry into the nature of the employee's connection must concentrate on whether the employee's duties take him to sea." 520 U.S. at 555. But that *dictum* should not be taken literally; "read in context" it is just "a shorthand way of saying that the employee's connection to the vessel regularly exposes him 'to the perils of the sea.'" *Endeavor Marine v. Crane Operators, Inc.*, 234 F.3d 287, 292 (5th Cir. 2000) (holding that a crane operator serving aboard a barge in the Port of New Orleans was a seaman as a matter of law). A worker does not have to breast ocean swells to face those perils. *See*

Harbor Tug, 520 U.S. at 558-59 (referring to the work of a deckhand on harbor tugs and ferry boats as "seagoing activity" and stating that such work subjects the worker to "the perils of the sea"). This Court has always afforded seaman status to workers who serve on inland waters.[27] As a seminal commentary by Professor David Robertson[28] explained, the Jones Act was designed to protect anyone who regularly encounters the characteristic perils of a seaman's work environment aboard an operating vessel, "even though it may be within sight and hailing distance of land." David W. Robertson, *A New Approach to Determining Seaman Status,* 64 Tex.L.Rev. 79, 80 (1985) *cited in Wilander,* 498 U.S. at 354.[29]

The lower courts should thus be using the elements of the substantial connection requirement, and not the definition of the term "vessel," to separate those sea-based

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[27] *Gizoni*, 502 U.S. at 83-84 (plaintiff injured on work platform in San Diego Harbor); *Senko*, 352 U.S. at 371-72 (plaintiff injured on levee in Illinois); *Norton*, 321 U.S. at 571 (plaintiff injured on harbor barge in Port of Baltimore); *O'Donnell*, 318 U.S. at 39 (plaintiff injured on shores of Lake Michigan). *Cf. Chandris*, 515 U.S. at 355 (characterizing work on an Ohio River towboat as "life upon the sea") (*quoting Warner v. Goltra*, 293 U.S. 155, 157 (1934)).

[28] Professor Robertson is also the author of Petitioner's Brief on the Merits herein.

[29] That article identifies the characteristic perils faced by seamen as "the full range of dangers associated with deep water, wind and weather, tide and currents, ocean predators, great distances from shore, relative isolation, and inaccessibility of shore-side facilities for aid and succor" as well as the full panoply of "risks attending the movement of vessels on navigable water." 64 Tex.L.Rev. at 80-81. *See also* David W. Robertson, *The Supreme Court's Approach to Determining Seaman Status: Discerning the Law Amid Loose Language and Catchphrases,* 34 J. Mar. L. & Com. 547, 570 & n. 140 (2003).

maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel. *Chandris, supra,* 515 U.S. at 368. The threshold vessel status inquiries posed by *DiGiovanni* and the work platform cases are not only unwieldy, they are unnecessary and irrelevant. When all is said and done, myopic definitions banning special purpose watercraft from vessel status do not predictably advance the process by which those who do not regularly face seaman's perils are winnowed out of Jones Act coverage. To the contrary, as Judge Wisdom recognized, the workers who serve aboard special purpose watercraft may be even more exposed to those peculiar hazards than the sailors who man more traditional ships. *Offshore*, 266 F.2d at 780 (observing that because offshore oil workers "run the risk of top-heavy drilling barges collapsing" they "are exposed to more hazards than are blue-water sailors").

These heightened hazards are by no means limited to offshore drill rig workers. Commercial divers, who work almost exclusively aboard special purpose barges, and who are strictly prohibited from diving off moving vessels by the Coast Guard "liveboat" regulations, 46 C.F.R. § 197.436(c)(3), are literally and continuously immersed in the perils of the sea. *See, e.g., Wallace v. Oceaneering International*, 727 F.2d 427, 435 (5th Cir. 1984) ("It is the inherently maritime nature of the tasks performed and perils faced by this profession, and not the fortuity of his tenure on the vessel from which he makes the particular dive on which he was injured, that makes [a diver] a seaman."); *Webster v. Seahorse Fleet, Inc.*, 637 F.Supp. 151, 153 (W.D.La. 1986) (commercial divers are "continuously subject to the perils of the sea like blue-water seamen if

not more so").[30] Another obvious example is furnished by the hands who served aboard the Nantucket lightship. The primary mission of that special purpose watercraft was not the transportation of cargo, equipment or passengers; it was to provide a fixed beacon for mariners. As a consequence, the lightship made nothing but short, infrequent voyages, and lay at anchor for most of its long career. But the tenders who kept its beacon lit faced all the characteristic perils of a seaman's work environment – especially the risks of collision and allision. Transatlantic liners, beginning or ending their voyages in the coastal waters off Massachusetts, routinely homed-in on the lightship's signature radio beam to guide themselves through the fog. One morning in May, 1934, *R.M.S. Olympic* (*Titanic's* sister) steamed out of the murk, sliced the anchored lightship in two and killed seven of its crew members. *See* John Maxton-Graham, *The Only Way to Cross* (Macmillan Co., 1972) 307. The remorseless rule in *DiGiovanni* would have automatically barred the victims' craft from vessel status, but the UBCJA respectfully submits that the light tenders involved in that allision were clearly seamen. So was Petitioner Stewart when he was injured in the allision aboard the *Super Scoop*.

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[30] *See gen.* John R. Hillsman, *Have All the Recent Twists and Turns in the Jones Act Left Deep Sec Divers High and Dry?*, 11 U.S.F.Mar.L.J. 47 (1998-99).

IV. SINCE THERE IS NOTHING ABOUT 33 U.S.C. § 902(3)(G) INDICATING THAT IT DOES NOT USE THE WORD "VESSEL" TO INCLUDE EVERY DESCRIPTION OF WATERCRAFT USED, OR CAPABLE OF BEING USED AS A MEANS OF TRANSPORTATION ON WATER, THE PROPER LEGAL STANDARD FOR DETERMINING THE STATUS OF SPECIAL PURPOSE WATERCRAFT UNDER THAT STATUTE IS 1 U.S.C. § 3.

The statutory rules of construction must be used "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise[.]" 1 U.S.C. § 1. Under those rules: "The term 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. As Petitioner points out, at least nineteen other federal statutes either incorporate that definition by reference or essentially reiterate it on their face.[31] At risk of belaboring the point, this Court has already used it to construe the crew member exclusion set forth in § 902(3)(G) of the LHWCA. *Norton,* 321 U.S. at 571 n. 4. So, in effect, have the lower courts in the Third, Fourth, Seventh and Ninth Circuits.[32]

The Ninth Circuit is the leader in this regard. Although "[t]here is no generalized test in the Ninth Circuit for determining whether a craft is a vessel in navigation" *see Martinez,* 303 F.3d at 1136-37, & n. 2, that court only denies vessel status to special purpose watercraft if they

[31] *See* Petitioner's Brief on the Merits, footnote 6 and accompanying text.

[32] *See* footnote 12 *supra* and accompanying text.

"are incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate." *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 660 (9th Cir. 1992). These cumulative criteria may be redundant, and stated in the negative, but they are perfectly consistent with 1 U.S.C. § 3. They also accept "that unusual-looking craft whose purpose is not the transportation of persons or things can be considered vessels under the Jones Act." *Gizoni II*, 56 F.3d at 1140, n. 1 (floating work platform); *see also Estate of Wenzel v. Seaward Marine Service, Inc.*, 709 F.2d 1326, 1328 (9th Cir. 1983) (submerged cleaning and maintenance platform). It has thus been suggested that: "There is no significant difference between the statutory definition of the term vessel [in 1 U.S.C. § 3] and the meaning attributed to it by the general maritime law as obtaining in this country." Steven F. Friedell, *supra*.

Since "[m]aritime tort law is dominated by statute," *Miles*, 498 U.S. at 36, and since the Jones Act is the "[f]oremost" enactment in the field of maritime torts, *American Dredging Co. v. Miller,* 510 U.S. 443 (1993), the UBCJA respectfully submits that 1 U.S.C. § 3 supplies the best legal standard for determining the vessel status of special purpose watercraft.

CONCLUSION

WHEREFORE, the UBCJA respectfully joins the Petitioner in asking the Court to complete its restatement of the essential elements for Jones Act standing by reversing the decision below and identifying 1 U.S.C. § 3 as the

legal standard for determining special purpose vessel status.

Respectfully submitted,

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APPENDIX A

CHRONOLOGICAL TABLE OF PUBLISHED DECISIONS HOLDING OR ASSUMING THAT A DREDGE IS A VESSEL.

Supreme Court Decisions

1. *The Virginia Ehrman*, 97 U.S. 309 (1877) (*allision case* – repeatedly referring to a dredge as a "ship" (*id.* at 310), a "vessel at anchor" (*id.* at 315), and a "vessel" (*id.* at 315, 316), and holding that a tug and the ship it was towing were both liable for allision damages to the owners of the anchored dredge).

2. *Ellis v. United States*, 206 U.S. 246 (1907) (*criminal case* – reversing dredge owners misdemeanor convictions for violation of a federal wage and hour statute on the ground that their employees were seamen and vessel crew members excluded from the act, holding that "the floating dredges were vessels" (*id.* at 259), and citing Rev. Stat. (1873) § 3 (now codified as 1 U.S.C. § 3).)

3. *Standard Dredging Corp. v. Murphy*, 319 U.S. 306 (1943) (*unemployment insurance tax case* – holding that State of New York could collect unemployment insurance taxes from the employer of an assistant cook on a dredge, indicating that a dredge is a vessel (*id.* at 308 & n. 3) and citing Internal Revenue Service Cumulative Bulletin 1937-1, p. 408, which states that "dredges used for navigation and transportation in carrying on the work of deepening and removing obstructions from channels and harbors are vessels within the meaning of . . . the Social Security Act.")

4. *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957) (*Jones Act case* – affirming a state court seaman's award to a handyman assigned to a dredge that lay moored alongside a levee in Illinois throughout

the plaintiff's employment, and which the Court described as "a stationary earth removing machine" (*id.* at 371), because: "No question has been raised at any time as to whether the dredge involved here had the status of a 'vessel' at the time of petitioner's injury." *Id.* at 371 n. 16.)[1]

Lower Court Decisions

5. *The Alabama*, 22 F. 449 (C.C.S.D.Ala. 1884) (*maritime lien case* – upholding admiralty jurisdiction over a dredge hand's wage lien *in rem* for unpaid wages against a dredge and two scows, stating a maritime lien for unpaid wages, stating that a dredge is probably a vessel and holding that a dredge and its scows taken "as one craft or thing" clearly constitute a vessel.)

6. *The Pioneer*, 30 F. 206 (E.D.N.Y. 1886) (*maritime lien case* – Relying on *The Alabama* (just above), awarding damages on a supplier's libel *in rem* against a dredge, citing the statute now codified as 1 U.S.C. § 3, and holding that a dredge is a vessel because it "is an artificial contrivance used, or capable of being used, as a means of transportation on water." *Id.* at 207.)

7. *The City of Alexandria*, 31 F. 427 (S.D.N.Y. 1887) (*collision case* – holding that a steamship, a tug, and the dredge it was towing were all at fault for a collision that occurred partly because the dredge had not discharged its obligations as a "vessel" under tow.)

[1] Three members of the Court dissented on the ground – later disapproved by *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 353 (1991) – that Jones Act seaman status requires the worker to aid in navigation. Even the dissenters, however, "assumed that this dredge may properly be regarded as a 'vessel.'" 352 U.S. at 375 n. 1.

8. *The Commodore*, 40 F. 258 (E.D.Va. 1887) (*libel in rem* – holding that an anchored dredge could be held liable *in rem*, for the negligence of its master, just like any other vessel.)

9. *The Endless Chain Dredge*, 40 F. 253 (E.D.Va. 1889) (*maritime lien case* – holding that a dredge could be held liable *in rem* for the maritime liens of suppliers and repairers, referring to the "vessel" (*id.* at 254), and stating that: "As to the question whether a steam-dredge, which is a floating scow fitted with steam appliances, bucket, and scoop, for deepening channels of navigation and like purposes, is a subject of admiralty jurisdiction, there have been repeated decisions in the United States and Great Britain in the affirmative." *Id.* (citations omitted).)

10. *Seabrook v. Raft of Railroad Cross-Ties*, 40 F. 596 (D.S.C. 1889) (*allision case* – awarding damages to the owner of an anchored dredge that was run down by a raft made of railroad crossties (as a way of bringing them to market), taking the vessel status of the dredge for granted (*id.* at 597), and holding that the raft was a vessel because it satisfied the rule of construction that is codified as 1 U.S.C. § 3. *Id.* at 598.)

11. *McNamara v. The Atlantic*, 53 F. 607 (D.S.C. 1893) (*maritime lien case* – upholding a dredge engineer's maritime lien for unpaid wages, and stating that: "Dredges and scows are subject to a maritime lien for services rendered. *The Alabama*, 19 F. 544." *Id.* at 608.)

12. *The Starbuck*, 61 F. 502 (E.D.Pa. 1894) (*maritime lien case* – upholding dredge crew's maritime lien for unpaid wages, and stating that: "That a dredge and her scows are to be treated as one concern, and are subject to the admiralty jurisdiction, has been several

times decided, and I think rightly. To discuss the subject would be a waste of time." *Id.* at 502 (citations omitted).)

13. *Saylor v. Taylor*, 77 F. 476 (CA4 1896) (*maritime lien case* – granting primacy to a dredge crew's maritime lien for wages on the ground that all "those who are employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight, to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners" (*id.* at 479), and holding that a dredge was a vessel under the definition that is now codified as 1 U.S.C. § 3.)

14. *The International*, 83 F. 840 (E.D.Pa. 1897), *aff'd*, 89 F. 484 (CA3 1898) (*customs case* – holding that the Collector of Customs could not seize a foreign built dredge under a tariff act because vessels could not be seized under that act, and because "Dredges transport their crews, coal, and other supplies, and are 'capable' of being used to transport other things" and are therefore "vessels" within the meaning of the rule of construction that is now codified as 1 U.S.C. § 3 *excluded* dredges (83 F. at 841).)

15. *McRae v. Bowers Dredging Co.*, 86 F. 344 (C.C.D.Wash. 1898) (*maritime lien case* – upholding dredge crew's maritime lien for unpaid wages and concluding that their dredge was a vessel.)

16. *Steam Dredge No. 1*, 87 F. 760 (D.N.J. 1898) (*maritime lien case* – holding that a dredge foreman could assert a maritime lien for unpaid wages, and taking it as settled law that dredges are vessels.)

17. *McMaster v. One Dredge*, 95 F. 832 (D.Ore. 1899) (*maritime lien case* – holding that a maritime lien against a newly completed dredge was invalid because the underlying claim was for construction

rather than repairs, but suggesting that, once it had entered navigation, the dredge would be a vessel "because she was constructed so as to move from place to place upon navigable waters" *Id.* at 833.)

18. *Bowers Hydraulic Dredge Co. v. Federal Contracting Co.*, 148 F. 290 (S.D.N.Y. 1906), *aff'd*, 153 F. 870 (CA2 1907) (*contract case* – upholding admiralty jurisdiction over contract dispute arising from a dredge charter, and rejecting the defendant's argument that the landfill work the dredge had been contracted to perform was non-maritime, because, "artificial distinctions [arising] out of the work of a dredge being performed partly on land and for the purpose of a land transaction should not oust the court of jurisdiction of a floating structure when its ordinary purpose is distinctly maritime." *Id.* at 294.)

19. *North American Dredging Co. v. Pacific Mail S.S. Co.*, 185 F. 698 (CA9 1911) (*liable in rem* – Upholding damage claim brought by the owner of a steamship against the dredge whose anchor chain had fouled the steamship's propeller, and treating the dredge as a vessel because: "A floating dredger capable of carrying her own machinery and implements and working crew, when employed as an aid to commerce in deepening navigable channels and harbors, is subject to the maritime law and to a maritime lien for a tortious injury to *another vessel* caused by negligence of those controlling her operations." *Id.* at 702 (emphasis added) citations omitted).)

20. *Richmond Dredging Co. v. Standard American Dredging Co.*, 208 F. 862 (CA9 1913) (*liable in rem* – holding that a dredge could be libeled *in rem* by an owner seeking its return from a charterer who was allegedly wrongfully retaining possession, and stating that *North American* [just above] definitively established that a floating dredge is a vessel. *Id.* at 866.)

21. *The Steam Dredge* A, 204 F. 262 (CA4 1913) (*maritime lien case* – upholding and re-ranking the maritime liens of various creditors, and treating a dredge, without comment, as a vessel.)

22. *The Dredge A*, 217 F. 617 (E.D.N.C. 1914) (*maritime lien* – accepting the case on remand from the decision just above, and stating "that Dredge A, after it was completed, was a vessel, and within the admiralty jurisdiction." *Id.* at 623-24 (citations omitted).)

23. *The Steam Dredge No. 6*, 222 F. 576 (S.D.N.Y. 1915), *aff'd*, 241 F. 69 (CA2 1917) (*limitation case* – accepting jurisdiction over a dredge owner's petition for relief under the Vessel Owners Limitation of Liability Act (now 46 U.S.C. app. § 183 et. seq.), which protects only "the owner of any vessel," and concluding that the defendant's arguments against the dredge's vessel status "are unsound, and do not require special attention." *Id.* at 580.)

24. *Eastern S.S. Corp. v. Great Lakes Dredge & Dock Co.*, 256 F. 497 (CA1 1919) (*limitation case* – upholding jurisdiction over a "drill boat" owner's petition for relief under the Vessel Owners Limitation of Liability Act, (*supra*), and stating that the statute that is now 1 U.S.C. § 3 supported jurisdiction because: "Drillboat No. 4 was a navigable structure having a permanent cargo, viz., its engines, boilers, drilling machinery, etc., which it transported from place to place for the purpose of removing ledges in navigable water and as an aid to commerce and navigation. It was not a floating dry dock intended to be permanently moored . . . , but was intended and used for the transportation of a

cargo which it carried from place to place to remove ledges." *Id.* at 501.)[2]

25. *Zurich General Acc. & Liab. Ins. Co. v. Industrial Acc. Comm'n*, 191 Cal. 770, 218 P. 563 (1923) (*workers' compensation case* – holding that a dredge hand killed in the course of his employment was a seaman, and therefore excluded from state workers' compensation benefits, because: "The dredger in this case, being engaged in deepening navigable waters, was a 'vessel' within the meaning of title 1, section 3 of the Revised Statutes of the United States [now codified as 1 U.S.C. § 3]." 218 P. at 567 (citations omitted).)

26. *The Hurricane*, 2 F.2d 70 (E.D.Pa. 1924), *aff'd*, 9 F.2d 396 (CA3 1925) (*maritime lien case* – upholding a maritime lien for the unpaid wages of the crew of the dredge *Hurricane*, and holding that "the *Hurricane*, being engaged in the work of deepening channels in navigable water, an occupation incident to navigation, is a vessel . . . ." 2 F.2d at 72.)

27. *Butler v. Ellis*, 45 F.2d 951 (CA4 1930) (*bankruptcy case* – upholding the priority of a dredge crew's claim for wages because: "The rule that dredges engaged in work in furtherance of navigation are vessels within the meaning of the maritime law, and as such are subject to maritime liens for wages and supplies furnished, is sustained by the overwhelming weight of authority." *Id.* at 955 (citations omitted).)

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[2] Judge Anderson dissented on the vessel-status point. He seemed to acknowledge 1 U.S.C. § 3 as the controlling statute, but he asserted that the drill boat was not "means of transportation" because it did most of its work standing still. *Id.* at 505.

28. *Warren & Arthur Smadbeck, Inc. v. Heling Contracting Corp.*, 50 F.2d 99 (CA2 1931) (*fire damage case* – accepting admiralty jurisdiction over a dispute between the owner and the charterer of a dredge that arose from destruction of the dredge by fire, and citing *Bowers*, *supra*, for the proposition that a floating dredge remains a vessel (and a contract for its hire remains maritime) whether it was doing landfill work or channel-deepening work.)

29. *Whalen v. Twin City Barge and Gravel Co.*, 280 Ill.App. 596, 1935 WL 348 (1935) (*Jones Act case* – upholding an award of Jones Act damages to a dredge hand because: "The defendant was the owner and possessor of a dredge boat and it was afloat on navigable waters of the United States and the plaintiff was in its employ and suffered personal injury in the course of his employment. He was a seaman within the meaning of the [Jones] act. . . ." 1935 WL 348 at * 8.)

30. *Kibadeaux v. Standard Dredging Co.*, 81 F.2d 670 (CA5 1936) (*Jones Act case* – holding that a dredge hand could be a seaman and citing 1 U.S.C. § 3 in support of characterizing the dredge as a vessel. *Id.* at 673.)

31. *Maryland Cas. Co. v. Lawson*, 94 F.2d 190 (CA5 1938) (*LHWCA case* – excluding a drowned dredge worker from LHWCA compensation because he was a "member of a crew" under the statutory provisions now codified as 33 U.S.C. § 902(3)(G), and concluding that his dredge was a "vessel" under 1 U.S.C. § 3.)

32. *Beddoo v. Smoot Sand & Gravel Corp.*, 128 F.2d 608 (D.C.Cir. 1942) (*Jones Act case* – assuming that a dredge was a vessel but holding that an injured dredge worker was not entitled to proceed under the Jones Act because he was not aboard primarily to aid

in navigation – a view later disapproved by this Court in *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991).)

33. *Bolan v. Bay State Dredging & Contracting Co.*, 48 F.Supp. 266 (D.Mass. 1942) (*Fair Labor Standards Act case* – holding that a dredge hand was "employed as a seaman", and therefore excluded from The Fair Labor Standards Act by 29 U.S.C. § 213(b)(6), because: "The dredge here was a vessel and in navigation." 48 F.Supp. at 269 (citations omitted).)

34. *Melanson v. Bay State Dredging & Contracting Co.*, 62 F.Supp. 482 (D.Mass. 1943) (*Jones Act case* – upholding an injured dredge worker's right to proceed under the Jones Act, and taking the Supreme Court's decision in *Ellis v. United States*, *supra*, as conclusively establishing that "floating dredges [are] vessels." *Id.* at 483 (quoting *Ellis*, 206 U.S. at 259).)

35. *Brown v. L.A. Wells Const. Co.*, 143 Ohio St. 580, 56 N.E.2d 451 (1944) (*Jones Act case* – holding that a dredge hand was a seaman and citing 1 U.S.C. § 3 to support its conclusion that his dredge was a vessel. 56 N.E.2d at 454.)

36. *Pariser v. City of New York*, 146 F.2d 431 (CA2 1945) (*Jones Act case* – upholding a damage award to a dredge hand and stating that the employer's contention that the injured worker was not a Jones Act seaman was "wholly without merit." *Id.* at 433.)

37. *Walling v. Bay State Dredging & Contracting Co.*, 149 F.2d 346 (CA1 1945) (*Fair Labor Standards Act case* – disagreeing with *Bolan*, *supra*, and holding that dredge hands are not excluded from the benefits of the Fair Labor Standards Act, but quoting *Butler v. Ellis*, *supra*, for the proposition that dredges were vessels. *Id.* at 351.)

38. *Walling v. Great Lakes Dredge & Dock Co.*, 149 F.2d 9 (CA7 1945) (*Fair Labor Standards Act case* – concluding, on grounds of liberal construction, *id.* at 10, that dredge hands are not excluded from the benefits of the Fair Labor Standards Act, but acknowledging that dredges are vessels, and that dredge hands are seaman for most purposes.

39. *Walling v. W.D. Haden Co.*, 153 F.2d 196 (CA5 1946) (*Fair Labor Standards Act* – agreeing with the two decisions just above, holding that dredge workers are not excluded from the benefits of the Fair Labor Standards Act, but acknowledging that dredges are vessels and dredge workers seamen for most purposes, including the Jones Act, because "a dredge boat operating in navigable waters is a vessel subject to the admiralty jurisdiction, required to show the lights and give the signals due by vessels; and the men working on it are in the general sense seamen entitled to enforce liens against it for wages and injuries." *Id.* at 198.)

40. *Gahagan Const. Corp. v. Armao*, 165 F.2d 301 (CA1 1948) (*Jones Act case* – upholding a Jones Act award to a dredge hand was injured while pumping silt and sand from the bottom of Boston Harbor to provide landfill material for Logan Airport on the ground that: "It is not disputed that *Dredge No. 5* is a vessel within the meaning of the statutory definition of vessel, as including 'every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.' Rev. Stat. 1875, Sec.3, 1 U.S.C. § 3." 165 F.2d at 305.)

41. *In re Arundel Corp.*, 273 A.D. 399, 78 N.Y.S.2d 270 (1948) (*unemployment compensation case* – holding that dredge hands did not fall within language excluding seamen from the state unemployment compensation law, but noting that "[d]redges have been

construed as 'vessels' and dredge men considered 'seamen' [so as to be entitled to] maritime liens for wages * * * [and] recover[y] for personal injuries under the Jones Act." 78 N.Y.S.2d at 273-74 (citations omitted).)

42. *Early v. American Dredging Co.*, 101 F.Supp. 393 (E.D.Pa. 1951) (*Jones Act case* – awarding Jones Act damages to a dredge hand and stating: "There can be no doubt that the dredge is a vessel. 'Vessel' is defined in 1 U.S.C. § 3 to include 'every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.' A dredge is a vessel . . . , even when it has no motive power of its own, since it is a means of transportation on water. Cf. *Norton v. Warner Co.*, 321 U.S. 565 [1944]." *Id.* at 395.)

43. *Covington v. Standard Dredging Corp.*, 61 So.2d 644 (Fla. 1952) (*Jones Act case* – holding that a dredge hand hurt while engaged in landfill work was not entitled to proceed under the Jones Act on the theory, later rejected in *Wilander, supra,* that his duties were not in aid of navigation, but clearly treating his dredge as a vessel.)

44. *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F.2d 383 (CA6 1953) (*Jones Act case* – upholding the Jones Act claims of dredge hands killed during a sand and gravel mining operation on the Mississippi River and repeatedly referring to their dredge as a vessel. *Id.* at 388.)

45. *McKie v. Diamond Marine Co.*, 204 F.2d 132 (CA5 1953) (*Jones Act case* – upholding the right of an injured dredge hand to proceed under the Jones Act, and repeatedly referring to his dredge as a vessel. *Id.* at 134, 136.)

46. *Chesser v. General Dredging Co.*, 150 F.Supp. 592 (S.D.Fla. 1957) (*maintenance and cure* – awarding maintenance and cure to a dredge hand and stating: "It is well settled that a dredge employed in navigable waters is a vessel under the Maritime Law . . . ." *Id.* at 595 (citations omitted). In dictum, the Court disparaged the view that dredges engaged in landfill work should not be regarded as falling under maritime law. *Id.*)

47. *Brannan v. Great Lakes Dredge & Dock Co.*, 253 Minn. 28, 91 N.W.2d 166 (1958) (*Jones Act case* – reversing a directed verdict that a dredge undergoing extensive repairs was not fit for service, holding that the dredge was a vessel as a matter of law, and remanding the case on the ground that the issue of whether the dredge was "in navigation" at the time of the injury was a jury question. 91 N.W.2d at 175-76.)

48. *Dunbar v. Henry DuBois' Sons Co.*, 275 F.2d 304 (CA2 1960) (*Jones Act case* – upholding an award of Jones Act damages to the widow of a drowned dredge deckhand in a case where the defendant did not contest the dredge's vessel status or the worker's seaman status.)

49. *Tyndall v. Conduit and Foundation Corp.*, 269 F.2d 947 (CA3 1959) (*Jones Act case* – affirming Jones Act award to an injured dredge hand and stating that if the worker in *Butler v. Whiteman*, 356 U.S. 271 (1958), was a seaman, then the instant worker was bound to be one as well. *Id.* at 949.)

50. *Arundel Corp. v. Jasper*, 219 Md. 519, 150 A.2d 415 (1959) (*Jones Act case* – affirming award of Jones Act damages and relying on *Senko v. LaCrosse Dredging Corp.*, *supra*.

51. *Lawrence v. Norfolk Dredging Co.*, 319 F.2d 805 (CA4 1963) (*Jones Act case* – upholding award of Jones Act damages to an injured dredge hand and noting that the defendant had conceded the dredge's vessel status during oral argument. *Id.* at 807.)

52. *Brinegar v. San Ore Constr. Co.*, 302 F.Supp. 630 (E.D.Ark. 1969) (*Jones Act case* – holding that an injured dredge hand was a seaman as a matter of law, and stating that "under a long train of court decisions the [dredge] *Mud Hen* is . . . a vessel" (*id.* at 638) and that in view of 1 U.S.C. § 3, "the defendant here can hardly claim that the dredge *Mud Hen* was not a vessel" (*id.* at 639) (citations omitted).

53. *Toland v. Atlantic Gahagan Joint Venture Dredge No. 1*, 109 N.J.Super. 186, 262 A.2d 886, *aff'd*, 57 N.J. 205, 271 A.2d 2 (1970) (*Jones Act case* – upholding an injured dredge hand's right to proceed under the Jones Act, and stating that "employees working aboard dredges on navigable waters are members of a crew of a 'vessel' and are entitled to a cause of action under the Jones Act and maritime law." 262 A.2d at 889 (citations omitted).)

54. *Potashnick-Badgett Dredging Inc. v. Whitfield*, 269 So.2d 36 (Fla.App. 1972) (*Jones Act case* – holding that a dredge was a vessel and a dredge hand a seaman as a matter of law because: "It is clear that a dredge may, in appropriate circumstances, be held to fulfill the first requirement [for seaman status], that of being a vessel. It is likewise clear that in order to be considered to be 'in navigation' a vessel need not be in motion at the time in question, as long as it is performing its particular function in waters that are navigable." *Id.* at 41 (citations omitted).)

55. *Ramos v. Universal Dredging Corp.*, 547 F.Supp. 661 (D. Haw. 1982) (*Jones Act case* – holding that a dredge engineer engaged in landfill operations was a seaman as a matter of law, and stating that: "A review of the authorities very quickly makes it clear that a dredge such as the one in the instant case is a 'vessel' within the meaning of the Jones Act." *Id.* at 663-64 (citations omitted).

56. *Stanfield v. Shellmaker, Inc.*, 869 F.2d 521 (CA9 1989) (*Jones Act case* – holding that Jones Act did not apply to injuries incurred on a dredge that was operating on non-navigable water but repeatedly referring to said dredge as a vessel.)

57. *O'Bryan v. Folk Constr. Co.*, 594 So.2d 900 (La.App. 1991) (*Jones Act case* – upholding a Jones Act award to a dredge hand, and assuming that a floating dredge doing landfill work is a Jones Act vessel.)

58. *Reeves v. Mobile Dredging & Pumping Co.*, 26 F.3d 1247 (CA3 1994) (*Jones Act case* – holding that the Jones Act does not apply to injuries on a dredge that is operating on non-navigable water but noting that the defendant had conceded the dredge was a vessel. *Id.* at 1251.)